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NO.

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IN THE

Supreme Court of the United States

October Term, 1988

GEORGIA ASSOCIATION FOR RETARDED CITIZENS, et. al.,
Petitioners,

vs.

CHARLES McDANIEL, et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether Congress may constitutionally enact curative legislation, such as the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, (HCPA), to retroactively restore the right of prevailing parties to obtain attorneys fees, where that legislation would have the effect of allowing a petition for fees notwithstanding a judgment denying attorneys' fees under another statute, based on the unexpected decision in Smith v. Robinson, 468 U.S. 992 (1984).

II. Whether Congress created a new and separate claim for attorneys fees in the Handicapped Children's Protection Act of 1986, so as to entitle the plaintiffs to petition for an award of fees, notwithstanding the denial of fees under another statute.

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FOR THE ELEVENTH CIRCUIT

Petitioners, Georgia Association for Retarded Citizens, et al., on behalf of themselves and all others similarly situated,[1/] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on September 21, 1988.

1/ The parties to the proceedings below were as follows: **Plaintiffs** - GEORGIA ASSOCIATION OF RETARDED CITIZENS,

(footnote continued on next page)

1/ (continued) individually and in behalf of its members and class; RUSSELL CAINE, individually and in behalf of others similarly situated, by and through his parents and next friends, L. DOUGLAS CAINE and VIRGINIA CAINE, individually and in behalf of others similarly situated. **Defendants** - DR. CHARLES McDANIEL, in his official capacity as State Superintendent of Schools, and individually; ROY A. HENDRICKS, A. J. McCLUNG, MRS. SARALYN OBERDORFER, JAMES F. SMITH, HOLLIS LATHEM, THOMAS K. VANN, JR., PAT G. KJORLAUG, LARRY A. FOSTER, SR., ASBURY STEMBRIDGE, CAROLYN HUSEMAN, JOE SEARS, RICHARD C. OWENS, JOHN TAYLOR, JUANITA BARANCO, BERNADINE CANTRELL, KATHERINE JASPER, BOBBY CARRELL, in their official capacities as State Board of Education Members, and individually; the STATE BOARD OF EDUCATION OF THE STATE OF GEORGIA; DR. SYLVESTER RAINS, in his official capacity as Superintendent of the Savannah-Chatham County Board of Education, and individually; DR. DONALD KNAPP, DR. MARTHA FAY, REV. WILLIAM F. STOKES, II, EMMA ADLER, CAPT. ROBERT FUNK, ESTER F. GARRISON, SPENCER LAWTON, JR., BETTY McCLENDEN, DR. ROBERT MORELAND, JR., SUSAN KARPF, BETTY BATTISTE, PRESTON BLACKWELDER, ANN CROWDER, JESSE DeLOACH, BENJAMIN PRICE, AND DANIEL WASHINGTON, in their official capacities as members of the Savannah-Chatham Board of Education and individually; and the SAVANNAH-CHATHAM BOARD OF EDUCATION.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as Georgia Association of Retarded Citizens, et al. v. McDaniel, 855 F.2d 805 (11th Cir. 1988). Plaintiffs' petition for rehearing and rehearing in banc was denied by the court without opinion on January 5, 1989, and is reported at 866 F.2d 1420.

The district court's decision on the plaintiffs' supplemental attorneys fees motion was entered on June 26, 1987. The district court's earlier decision denying plaintiffs' initial request for attorneys fees was entered on August 19, 1985, and reconsidered by order of November 29, 1985. These orders are unreported but are included, along with the opinion and order of the Court of Appeals for the Eleventh Circuit, in the Appendix.

JURISDICTION

The judgment of the Eleventh Circuit

United States Court of Appeals was entered on September 21, 1988, and the order denying plaintiffs' petition for rehearing and rehearing in banc was entered on January 5, 1989. This Petition for a Writ of Certiorari is filed within ninety days of the Court of Appeals' denial of the suggestion for rehearing and rehearing in banc. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1). In accordance with SUP. CT. R. 28(b) and 28 U.S.C. § 2403(a), this case may involve the constitutionality of an Act of Congress. The Attorney General of the United States was served with a copy of the opinion of the Eleventh Circuit Court of Appeals. 855 F.2d at 810 n. 3. Additionally, a copy of this petition has been served on the Solicitor General.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment 14, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION INVOLVED

Pub. L. No. 99-372, Section 5, 100 Stat. 796 (Aug. 5, 1986):

> The amendment made by section 2 shall apply with respect to actions or proceedings brought under section 615(e) of the Education of the Handicapped Act after July 3, 1984, and actions or proceedings brought prior to July 4, 1984, under such section which were pending on July 4, 1984.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 60(b):

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2)

newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

This action began in 1978 as a challenge by mentally handicapped children to the refusal of the State of Georgia and the Savannah-Chatham County Board of Education to provide extended school year services under the Education for All Handicapped Children Act, 20 U.S.C. § 1400 et seq. ("EHA"). The children contended that such services were essential to enable them to benefit from special educational services, as they risked losing the skills learned over the school year if they were not provided continuing services during the summer. The children raised claims under the EHA, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the Fourteenth Amendment to the United States Constitution. Jurisdiction was asserted under 20 U.S.C. § 1415 (e)(4); 28 U.S.C. § 1343(3) and (4); 28 U.S.C. § 1337; 42 U.S.C. § 1988; and the court's pendent jurisdiction.

In April 1981, the plaintiffs obtained substantial declaratory and injunctive relief. The district court found that the children were entitled to be considered for extended school year services in the context of the development of their Individualized Education Plans, required under the EHA. G.A.R.C. v. McDaniel, 511 F. Supp. 1263 (N.D.Ga. 1981). The plaintiffs then moved for an award of $65,625.13 in costs and attorneys fees under the Civil Rights Attorneys' Fees Awards Act of 1986, 42 U.S.C. § 1988 and 29 U.S.C. § 794a, on June 15, 1981. The motion was stayed on September 11, 1981, pending resolution of the lengthy appeals on the merits that ensued. The Eleventh Circuit Court of Appeals affirmed the relief on the merits on October 17, 1983. G.A.R.C. v. McDaniel, 716 F.2d 1565.

On July 3, 1984, Smith v. Robinson, 468 U.S. 992 (1984) was decided, which held

that prevailing parents in EHA cases may not seek attorneys' fees under 42 U.S.C. § 1988 or 29 U.S.C. § 794a. The Court found that Congress intended to make the EHA the exclusive remedy for special education claims. The EHA itself had no attorneys fees provision, and the Court held that no attorneys fees could be awarded under any other statute.

The defendants in this case had petitioned for certiorari to this Court on the merits, and the case was vacated and remanded following Smith. 468 U.S. 1213. On September 12, 1984, the Eleventh Circuit's mandate, which affirmed the relief on the merits, but only under the EHA, was entered as the judgment of the district court. G.A.R.C. v. McDaniel, 740 F.2d 902 (11th Cir. 1984), cert. denied, 469 U.S. 1228 (1985).

On March 12, 1985, the plaintiffs sought a continued stay of their earlier

attorneys fees petition based on legislative initiatives in Congress following Smith v. Robinson, 468 U.S. 992 (1984). Nonetheless, the district court proceeded to deny the petition for the $54,823 in attorneys fees for work at the trial level on August 19, 1985.

On motion to alter, amend or reconsider that order, plaintiffs pointed out that they could still seek fees under 42 U.S.C. § 1988, based on Manecke v. School Board of Pinellas County, Fla., 762 F.2d 912 (11th Cir. 1985), for the procedural violations which they had alleged against the defendants under the Fourteenth Amendment. They no longer sought fees under 29 U.S.C. § 794a for their Section 504 claims, due to Smith. The district court denied the plaintiffs' motion for reconsideration on November 29, 1985.

Meanwhile, on July 24, 1984, legislation had been introduced in Congress to

clarify the intent of Congress that prevailing parents should be able to recover fees in EHA cases. These initiatives included full retroactivity provisions back to the date of Smith. Although these proposals died with the 98th Congress, new bills were introduced in 1985 which were ultimately enacted in August 1986 as the HCPA. This statute provides that attorneys fees shall be available to prevailing parties in any case "brought ... after July 3, 1984, and actions or proceedings brought prior to July 4, 1984, ... which were pending on July 4, 1984." Pub. L. No. 99-372, Section 5, 100 Stat. 796 (Aug. 5, 1986).

On August 29, 1986, the plaintiffs filed a supplemental motion for attorneys fees solely under the new HCPA. At that time the request totalled $124,421, including all time spent on the appeals. On June 29, 1987, that motion was denied. That order was appealed to the Eleventh

Circuit Court of Appeals.

On September 21, 1988, the panel ruled that attorneys fees could not be awarded because the HCPA was enacted after the judgment in this case denying fees under 42 U.S.C. § 1988 and 29 U.S.C. § 794a. 855 F.2d 805. The court held that, although this case was "pending" before this Court on July 4, 1984, and therefore came within the literal terms of the HCPA, it was not "pending" for purposes of application of the retroactivity provision. The court held that to apply the HCPA retroactively in this case would deprive the defendants of their "vested right" in their non-liability for attorneys fees. The court found that two constitutional principles barred such an application of the HCPA: (1) that a legislature has no greater power over a right fixed by judgment than over any other property interest; and (2) that the legislature has no right to infringe upon pre-

vious judicial action. Notwithstanding the explicit retroactivity provisions of the HCPA making it applicable to all cases pending on July 4, 1984, or brought after July 3, 1984, the panel looked to one Senate Report, which did not address the issue at bar, to conclude that Congress had not explicitly provided that the HCPA abrogate previous judgments denying fees. 855 F.2d at 808 n.2. The court therefore declined to find that the HCPA entitled plaintiffs to an award of fees. The panel also rejected the plaintiffs' argument that the HCPA created a new and different entitlement to attorneys fees which had not previously been adjudicated.[2/] On January

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2/ The Eleventh Circuit also held that "[t]he district court's August 19, 1985 order did not relieve the defendants from any liability for fees resulting from proceedings not comprehended in that order." 855 F.2d at 814. That order included fees only for work at the trial level, amounting to $54,823 at the time.

(footnote continued on next page)

5, 1989, the plaintiffs' petition for rehearing and rehearing in banc was denied.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. CONGRESS MAY CONSTITUTIONALLY ENACT CURATIVE LEGISLATION, SUCH AS THE HANDICAPPED CHILDREN'S PROTECTION ACT OF 1986, PUB. L. NO. 99-372, (HCPA), TO RETROACTIVELY RESTORE THE RIGHT OF PREVAILING PARTIES TO OBTAIN ATTORNEYS FEES, WHERE THAT LEGISLATION WOULD HAVE THE EFFECT OF ALLOWING A PETITION FOR FEES NOTWITHSTANDING A JUDGMENT DENYING ATTORNEYS' FEES UNDER ANOTHER STATUTE, BASED ON THE UNEXPECTED DECISION IN SMITH V. ROBINSON, 468 U.S. 992 (1984).

This case presents the important federal question of whether Congress can constitutionally enact a curative statute which has the result of allowing a petition for fees notwithstanding a previous judgment denying attorneys fees under a

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2/ (continued) See, Appendix, Exh. C. Yet the circuit's construction of the district court's order did not result in a remand with instruction to assure that only those fees subject to prior judgment were precluded. Therefore, the plaintiffs' fees for time spent prevailing on appeal have not been subject to a prior order, but nevertheless have not been awarded.

different statute. The Eleventh Circuit's decision improperly impairs Congress' ability to address unexpected judicial interpretations or applications of statutes by curative legislation. The Eleventh Circuit's view that an inviolable "vested" right emerges from an unappealed order conflicts with the manner in which this Court and others have analyzed retroactive legislation, and creates "rights" not subject to curative legislation. The Eleventh Circuit ignored the special deference accorded to curative legislation and failed to apply the balancing test established by the case law for assessing the constitutionality of retroactive legislation, instead erecting an inflexible standard for statutory construction which does not permit consideration of the various interests and purposes of each particular piece of legislation.

In this case the Eleventh Circuit

ignored unambiguous Congressional intent and has seriously misconstrued a curative act of Congress. In the HCPA, Congress intended to restore to all prevailing EHA plaintiffs the ability to recover their attorneys fees, a remedy which had been unexpectedly denied by Smith.

Several important purposes are furthered by applying the HCPA retroactively, including allowing families with private counsel to recover lost family resources spent in pursuing EHA claims and allowing legal services programs to represent additional clients in EHA actions. Counsel v. Dow, 849 F.2d 731, 738 (2d Cir. 1988).[3/] In

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3/ See also, 131 CONG. REC. S10399 (July 30, 1985) (remarks of Sen. Kerry)("...money awarded to publicly funded attorneys is recycled back into the organizations for which the attorney works to expand services to low-income individuals."); id. at S10401 (remarks of Sen. Simon)("...these funds increase the organization's ability to help persons who too often have turned to them in desperation."); 132 CONG. REC. S9278 (July 17,

(footnote continued on next page)

the instant case, retroactive application of the HCPA to permit a fee award would restore spent resources to the plaintiffs and allow the Georgia Association of Retarded Citizens and legal services to engage in future advocacy for handicapped children.

Two questions are presented here: (1) did Congress intend for the HCPA to apply retroactively so as to affect judgments, and (2) if so, can Congress do so constitutionally.

A. Congress intended for the HCPA to restore the plaintiffs' right to seek attorneys fees.

With the HCPA, Congress sought to reverse the unexpected decision in Smith v. Robinson, 468 U.S. 992 (1984), which held that attorneys fees were not available

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3/ (continued) 1986)(remarks of Sen. Kerry)("...the lack of sufficient funding sources seriously impedes the ability of public advocates to adequately work on behalf of indigent handicapped children when their educational rights are being denied.")

under the EHA. To do so, it provided that the HCPA's attorneys fees provision, in particular, would be applicable to all cases pending on July 4, 1984, or brought after July 3, 1984. Immediately following Smith, legislation was introduced in both houses to overturn it. Both proposals had retroactivity provisions. See, S. 2859 and H.R. 6014, introduced on July 24, 1984, 130 CONG. REC. S9078, 130 CONG. REC. H7687-7688. These bills died with the 98th Congress. S. 415 and H.R. 1523 were introduced early in the 99th Congress, each containing retroactivity provisions dating to the day before Smith. See, 131 CONG. REC. S1195 (Feb. 6, 1985) and 131 CONG. REC. H1172 (March 7, 1985). Testimony on the bill underscored the need for the retroactivity provision to cure the error of Smith. No distinction was drawn between cases where fees had been denied and cases where the issue had never been reached.

See, Handicapped Children's Protection Act: Hearing on H.R. 1523 Before the Subcommittee on Special Education of the Committee on Education and Labor, 99th Cong. 1st Sess. (1985).

Similar testimony was heard in the Senate hearings. See, Handicapped Children's Protection Act of 1985: Hearing on S. 415 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Human Resources, 99th Cong. 1st Sess. (1985). One of the most important witnesses was Mary Tatro[4/] who testified how the school defendants had tried to exhaust her resources. Id. at 6, 8. Her fees, pending at the time of Smith, had been denied based on Smith.[5/]

4/ See, Irving Independent School District v. Tatro, 468 U.S. 883 (1984).

5/ Following enactment of the HCPA, Mary Tatro recovered fees. Tatro v. State of Texas, ___ F. Supp. ___, E.H.L.R. Dec. 558:430 (N.D. Tex. 1987). See, G.A.R.C. v. McDaniel, 855 F.2d 805, 807-808.

The debate in both houses focused on restoring the rights that Smith had destroyed. See, 131 CONG. REC. H9966-9973 (Nov. 12, 1985). See also, H. R. REP. No. 99-296, 99th Cong. 1st Sess. (1985). Members of Congress explicitly intended for the HCPA to be applied retroactively to cases such as the one at bar, where the attorneys fees issue had been resolved adversely to prevailing plaintiffs as a result of Smith. Senator Simon, a co-sponsor of both the EHA and the HCPA, explained:

> The conference agreement makes the authorization of fee awards retroactive . . . This provision is necessary to ensure that actions ... resolved in the period between the Court's decision and enactment of this legislation will not arbitrarily be treated differently from those resolved either prior to the decision or subsequent to this legislation.

132 CONG. REC. S9279 (July 17, 1986) (emphasis supplied). Senator Kerry also spoke to the issue:

> I would like to underscore that the purpose of this clause is to permit fee awards in suits in which a fee application was pending on or after July 4, 1984, and was rejected because of **Smith v. Robinson**... It is critical that we clarify the availability of rights afforded to parents of handicapped children so that actions ... resolved in that period will not be treated differently from those resolved prior to the decision or after the passage of the act...

132 CONG. REC. S9278 (July 17, 1986) (emphasis supplied). Senator Kerry raised the issue twice, stating later in his remarks:

> I applaud my colleagues for including the retroactive provision in the conference report. I would like to underscore that the purpose of this clause is to permit fee awards which were pending previously but which were rejected because of Smith versus Robinson. I think it is critical to clarify the availability of those rights.

Id. Rep. Biaggi, in reporting the bill to his colleagues for a final vote after a joint conference had resolved various differences in the House and Senate versions,

explained:

> I am pleased that this report contains a retroactivity provision. It is of paramount importance in insuring that actions and proceedings successfully resolved during the time between the Court's decision and enactment of this legislation will not arbitrarily be treated differently from those resolved either prior to the Supreme Court decision, or subsequent to this legislation.

132 CONG. REC. H4843 (July 24, 1986) (emphasis supplied).[6/] Congress was aware that fees had been denied based on Smith in the interim between the decision and the passage of the HCPA. See, e.g., Bonar v. Ambach, 771 F.2d 14 (2d Cir. 1985); Yaris v. Special Sch. Dist. of St. Louis County, 780 F.2d 724, 727 (8th Cir. 1986), cert. denied, 476 U.S. 1172 (1986). Congress

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6/ The legislation took two years to enact because of debates concerning, inter alila, the method for setting the fee rate, whether publicly-funded attorneys should receive "market" rates or not, whether fees should be allowed for work at the administrative level. There was never any disagreement over the retroactivity provision.

must have known that there would be "dead" cases subject to this provision; "[i]t would be anomalous for Congress to enact a statute that reverses Smith and then not have it affect a case which the Court of Appeals decided on the authority of Smith." Capello v. D.C. Board of Education, 669 F. Supp. 14, 17 (D.D.C. 1987).

The broad wording of the retroactivity provision must have meant that Congress intended to address all situations, including that of the plaintiffs at bar. The Eleventh Circuit has carved an exception into the statute - for cases in which a fee award was entered denying fees based on other statutes - which is not supported by either the terms of the HCPA or its legislative history.

B. Congress can constitutionally enact a curative statute which abrogates a previous judgment.

A curative statute is one that "retroactively adjust[s] existing legislation

to conform to the putative intent of the legislature." Munzer, "A Theory of Retroactive Legislation", 61 TEX. L. REV. 425, 468 (1982). Curative statutes are accorded special deference against constitutional challenges, even where the effect is to abrogate judgments. The fact that the defendants' asserted "vested right" rests upon a judgment does not immunize it from retroactive curative legislation.

In Utter v. Franklin, 172 U.S. 416, 19 S.Ct. 183, 186 (1899), for instance, the Court held that bonds previously invalidated by a court could be retroactively validated by action of the legislature. The Court said,

> Curative statutes of this kind are by no means unknown in federal legislation...
>
> The fact that this court had held the original Pima County bonds invalid does not affect the question. They were invalid because there was no power to issue them ... The judgment in that case was res adjudicata only of the issues then presen-

> ted, of the facts as they then appeared, and of the legislation then existing.

In Carpenter v. Wabash, 309 U.S. 23 (1940), a magistrate had previously decided that a personal injury claim had no priority in a receivership. The Bankruptcy Act was subsequently amended to provide for priority of such claims, and this Court approved the retroactive application of the statute, establishing the previously-denied priority.

In Fleming v. Rhodes, 331 U.S. 100 (1947), this Court considered the retroactive application of federal protective statutes which had prevented the eviction of tenants during the war years. During a gap in the effective dates between two such statutes, a private landlord had obtained state court judgments of eviction. This Court had no difficulty applying the federal legislation to prevent the enforcement of those evictions. The Court held:

> So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise the paramount powers of Congress could be nullified by 'prophetic discernment.' The rights acquired by judgments have no different standing.

331 U.S. at 107.

In Paramino Lumber Co. v. Marshall, 309 U.S. 370 (1940), the Court approved a private act allowing the submission of additional evidence following an adjudication of a worker's compensation award. The Court characterized the statute as one which "cure[d] a defect in administration", rather than one which "set aside a judgment, create[d] a new right of action, or direct[ed] the entry of an award." 309 U.S. at 378.

In a case similar to that at bar, Shannon v. HUD, 433 F. Supp. 249 (E.D. Pa. 1977), aff'd, 577 F.2d 854 (3rd Cir.),

cert. denied, 439 U.S. 1002 (1978), the district court originally denied attorneys fees under 42 U.S.C. § 3612, in an order which was not appealed. Following the enactment of 42 U.S.C. § 1988, the plaintiffs re-petitioned for fees and the court had no difficulty considering the new fee claim. Ultimately the fee petition was denied, but not on retroactivity grounds. See also, Gaines v. Dougherty County Bd. of Educ., 775 F.2d 1565 (11th Cir. 1985), where the Eleventh Circuit itself permitted a new claim for fees based on statutes passed after orders were entered denying fees.

Other circuit courts have also approved retroactive curative legislation, notwithstanding its impact upon a prior judgment. In Shung v. Brownell, 227 F.2d 40 (D.C. Cir. 1955), aff'd, 352 U.S. 180 (1956), the Court had previously rejected, on procedural grounds, an alien's petition

for review of an exclusion order. Congress enacted a new statute, permitting review of such orders, and the Court applied the statute to permit review of the earlier exclusion order. In West Coast Life Ins. Co. v. Merced Irrigation District, 114 F.2d 654 (9th Cir. 1940), cert. denied, 311 U.S. 718 (1941), the court allowed a new petition for confirmation of a bankruptcy plan, under a statute passed to cure constitutional defects in an earlier bankruptcy act, even though the previous plan had been rejected as being brought under the unconstitutional statute. The court said, "This holding [the earlier bankruptcy dismissal] cannot be tortured into a decree that forever bars the petitioner from enjoying with all others this completely changed situation."

"Curative acts ... stand out from other varieties of retroactive legislation because, instead of being scrutinized, they

are routinely upheld... [they] tend to confirm expectations and to protect those who rely on the underlying merits of a claim rather than those who grasp at legal technicalities." Munzer, "A Theory of Retroactive Legislation," 61 TEX. L. REV. 425, 469-470 (1982) (hereinafter "Munzer 'Theory'"). The balancing test discussed infra is applied in such a situation as in any other challenge to retroactive legislation, with special deference being provided because of the curative nature of the legislation. "The Court may deem the interest in the retroactive application of the statute to a right which has been reduced to judgment prior to its enactment sufficient to outweigh the disadvantages of such application." Hochman, "The Supreme Court and the Constitutionality of Retroactive Legislation," 73 HARV. L. REV. 692, 719 (1960) (hereinafter "Hochman").

The HCPA is curative legislation en-

acted to avoid a potential inequity among prevailing EHA plaintiffs, based on an unexpected interpretation by this Court of the intent of Congress in the EHA. Given the unusually explicit congressional purpose in enacting the HCPA, to cover situations like the one at bar, the Eleventh Circuit's holding should be reversed.

This Court has itself provided for the modification of judgments by court rule, thus undercutting the notion that rights conferred by judgments are "vested" and not subject to modification. FED. R. CIV. P. 60(b) permits the modification of a judgment under various circumstances, including "(6) any other reason justifying relief from the operation of the judgment." As stated in 6A MOORE'S FEDERAL PRACTICE Par. 60.02, p. 60-16 (1987), "...on the allegation of circumstances that may have resulted in inadequate consideration of the issues determined, or sometimes on the

allegation of intervening events, a judgment may be reopened on motion under Rule 60(b) or in very limited circumstances, set aside in an independent action. In sum, the doctrine of judicial finality is relative and contextual." Common law writs existed in ancient times to permit relief from judgments both at law and in equity. Rule 60(b) was an embodiment of those ancient writs as well as the court's inherent power to remedy an injustice caused by one of its judgments.

In summary, the Eleventh Circuit's decision should be vacated because it fails to accord proper deference to constitutionally permissible curative legislation and defeats the intent and purpose of Congress in enacting the HCPA.

C. The balancing test applied to retroactive legislation supports allowing the HCPA fee claim in this case.

A retroactive statute changes the legal status of events that have occurred

in the past. Munzer, "Retroactive Law," 6 J. LEGAL STUDIES 373, 381 (1977) (hereinafter "Munzer 'Retroactive Law'"). Although retroactive legislation is generally disfavored, it is approved in many situations and it is certainly not per se unconstitutional. A court must analyze the circumstances and balance the interests at stake in the legislation and its retroactive effect.

Analysis of the permissible scope of a retroactive law requires a balancing test, taking into account several factors, including (1) the nature and strength of the public interest served by the statute, (2) the extent to which the statute modifies or abrogates the asserted preenactment right, and (3) the nature of the right which the statute alters. Hochman, supra, at 697. Stated differently, the analysis looks at (1) the importance of the social policies underlying the new enactment, including the

gravity of the social evil to be corrected, and (2) the extent to which retroactivity is necessary to achieve the legislature's social policies, as against (1) whether reliance on prior law by the party affected by retroactivity was reasonable, (2) the extent of actions taken by the party on the basis of such reliance, (3) the extent of disruption or impairment of that course of conduct resulting from the retroactive application of the law. Reppy, "Retroactivity of the 1975 California Community Property Reforms," 48 S.CAL. L. REV. 977, 1047 (1960) (hereinafter "Reppy").

Here, however, the Eleventh Circuit applied a per se rule, finding that if legislation abrogates a judgment, it is unconstitutional. Analysis under this balancing test reveals that this is not correct.

1. The availability of fees under the HCPA furthers an important social policy.

Retroactive laws can have important social functions, including correcting the distinctions between classes or statuses. Munzer "Retroactive Law", supra at 373. Such statutes enhance the ability of the law to deal with economic and other problems. On the other hand, as Munzer states elsewhere, " . . the rule of law itself can have social and economic effects. To invoke it against retroactive lawmaking can sometimes shelter, even exacerbate, injustice." Munzer, "Theory," at 471.

Congress was concerned with restoring the ability of parents to utilize the procedures and remedies in the EHA to assure that their handicapped children are provided special educational services appropriate to the needs of those children. The EHA was enacted under the Fourteenth Amendment to the United States Constitution to vindicate decades of deprivation of equal educational services to handicapped children who

had been ignored by educational agencies. Several important goals are furthered by the retroactive application of the HCPA, such as allowing families with private counsel to continue with ongoing EHA suits and recover the lost family resources spent in pursuing the EHA claim, and allowing legal services programs to represent additional clients in EHA suits. Counsel v. Dow, 849 F.2d 731, 738 (2d Cir. 1988). See also, n. 2, supra. In short, fundamental critical social policies underlie these statutes protecting the rights of handicapped children.

The importance of social policy in the analysis of retroactive legislation can be seen in the so-called "public rights" exception to the general rule against retroactive application. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 Howe) 421, 15 L.Ed. 435 (1856); Hodges v. Snyder, 261 U.S. 600 (1923). In Bradley v.

School Board of City of Richmond, 416 U.S. 696 (1974), legislation was enacted during the pendency of the litigation authorizing an award of attorneys fees, and the Court held that that statute could be retroactively applied to allow fees for all work done since the initiation of the action. The Court recognized that plaintiffs in a school desegregation case render substantial service not only to their class, but also to the school board and the community, by bringing the board into compliance with constitutional mandates. 416 U.S. at 718.

In Frankel v. Commissioner of Education, 480 F. Supp. 1156 (S.D.N.Y. 1979), the court found the EHA to possess the same "public service" attributes as those identified in Bradley. Thus, even if the HCPA were not explicitly "curative" legislation, it should fall within the class of "public rights" cases which justify retraoctive application.

2. Respondents cannot rely on their asserted "preenactment right."

As the balancing tests set out above suggest, an important question raised by retroactive legislation is that of fairness to the parties affected by the legislation. In this case, fairness requires that the plaintiffs' fee petition under the HCPA be allowed.

The "preenactment right" asserted here is the right of the defendants not to pay attorneys fees to prevailing plaintiffs in litigation under the EHA. Prior to Smith, all the parties in the instant case expected that the defendants would be liable for attorneys fees if the plaintiffs were successful. Smith created the possibility of a windfall for the defendants. According to the Eleventh Circuit, that windfall "vested" when the district court denied the plaintiffs' fee application under 42 U.S.C. § 1988 in August 1985. Contrary to the

Eleventh Circuit's view, however, the fairness principal dictates retroactive application of the HCPA in the circumstances of this case. The Eleventh Circuit's result elevates a unilateral action by the district court, which the plaintiffs diligently sought to avoid,[7] and which unjustly enriches the defendants, to a "vested right."

Prior to Smith attorneys fee awards in EHA litigation were common and expected. S. Rep. No. 99-112 at 4 (Labor and Human

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[7] Early in the Eleventh Circuit's opinion, the court correctly noted that "...the plaintiffs asked the district court to delay ruling on the motion for attorney's fees until Congress had time to act," 855 F.2d at 807; however, its comment that "...the plaintiffs continued to press their motion for fees in the face of Smith...," id. at 813, ignored that this occurred on reconsideration, after the district court had denied their motion for a stay, and that it was based on an independent claim not resolved in Smith, for which there was explicit authority in the circuit. Manecke v. Pinellas County School Board, 762 F.2d 912 (11th Cir. 1985).

Resources Committee, July 25, 1985), reprinted at 1986 U.S. CODE AND CONG. ADMIN. NEWS 1798, 1804 (Of 42 successfully litigated cases under the EHA, 15 had been awarded fees ranging from $2000 to $212,000.) Moreover, within twenty days of Smith, Congress began moving to restore the availability of fees, with the introduction of S. 2859 and H.R. 6014 on July 24, 1984. 130 CONG. REC. S9078; 130 CONG. REC. H7687-7688. Although these bills died with the closing of the 98th Congress, similar bills were quickly introduced in the 99th Congress which ultimately became the HCPA. Thus the defendants knew or should have known that they still faced liability for fees.

Munzer suggests that courts should protect those expectations that are rational and legitimate against retroactive infringement, although even these expectations should be subject to being overridden

when necessary under principles of justice. Munzer "Theory" at 429. In this case, the defendants had no rational or legitimate expectations, prior to August 1985, that they would be immune from attorneys fees should the plaintiffs prevail. The judgment of August 1985 is nothing more than a "windfall" to them. Even when substantial, such windfalls are given little protection from retroactive legislation. Slawson, "Constitutional and Legislative Considerations in Retroactive Lawmaking", 48 S. CAL. L. REV. 216, 226 (1960)..

Furthermore, the defendants have never suggested that they would be harmed in any way by the retroactive application of the HCPA, permitting a claim for fees, other than, of course, the liability for fees itself. In Fleming v. Rhodes, 331 U.S. 100 (1947), this Court held that the landlord's reliance on the judgments of eviction was not justifiable, and affirmed the injunc-

tion against their enforcement.

In a case concerning the HCPA, the Ninth Circuit Court of Appeals observed that, "[e]very defendant who settled a case after the Robinson decision but before the enactment of the Handicapped Children's Protection Act can make identical allegations [that it had no expectation of paying fees]...The effect of accepting them would be to defeat the retroactive provision of the statute." Abu-Sahyun v. Palo Alto Unified School District, 843 F.2d 1250, 1252 (9th Cir. 1988). Any such expectation of the defendants in this case is similarly unfounded, and likewise, accepting those arguments defeats the retroactivity provision of the statute.

In terms of the defendants' expectations regarding their fee liability, the present situation contrasts starkly with that in Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974), where liti-

gation spanned years during which the defendants had no expectation of being liable for fees. Nonetheless, when Congress finally provided for fees in school desegregation cases, the Court readily applied that statute retroactively. The availability of attorneys fees furthered an important social function of encouraging litigation to vindicate constitutional rights to equal educational opportunity. The same is true in this case.

In summary, the balancing test which must be applied to test the validity of retroactive legislation compels the conclusion that the HCPA constitutionally permits the plaintiffs to seek fees in this case. The statute advances important social policies, and the defendants' expectation was that they would be liable for fees if they lost. The per se rule applied by the Eleventh Circuit prevents the Congress from curing future unexpected judicial statutory

interpretations. This flexibility is particularly critical in the area of constitutional and public rights.

D. The HCPA's impact on a judgment does not offend due process or separation of powers principles.

The issue which sets this case apart from the general test of retroactive legislation is the existence of the judgment of August 1985 denying attorneys fees to the plaintiffs on their petition under 42 U.S.C. § 1988. The Eleventh Circuit's holding that such an application would offend due process erects an inflexible standard of retroactivity which is contrary to the holdings of this Court, and precludes Congress from responding to changing circumstances by new legislative solutions. The Eleventh Circuit exceeded the permissible bounds of judicial activity and created a judicial exemption in a statute,[8/]

8/ Although the Eleventh Circuit believed it avoided a separation of powers
(footnote continued on next page)

ignoring explicit statutory language and congressional intent regarding the retroactive effect date of the attorneys' fees provision of the HCPA.

The Eleventh Circuit assumed, without analysis, that the "right" not to pay attorneys fees is a "vested" protected property interest. At least one court, having analyzed the question, has held to the contrary. In Capello v. District of Columbia Board of Education, 669 F. Supp. 14 (D.D.C. 1987), the court held, "[d]ecisions which relieve the government from paying fees are not affirmative judgments which constitute benefits protected by the due process clause." That court distinguished cases in which benefits conferred by judgments were held to be inviolable by later statutory changes, such as Daylo v. Admini-

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problem by its result, it in fact created a separation of powers problem by refusing to apply a validly enacted statute to a specific case.

strator of Veterans Affairs, 501 F.2d 811 (D.C. Cir. 1974). See also, Greene v. United States, 376 U.S. 149 (1964). In that case, retroactive application of Department of Defense regulations was denied where it would have placed a heavier burden on Greene to re-establish his right to a security clearance, where that clearance had been held to have been improperly revoked in an earlier decision. This Court held, "...a retrospective operation will not be given to a statute which interferes with antecedent rights...unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislation'", quoting Union Pacific Railroad Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913). 376 U.S. at 160.

Even assuming arguendo that the respondents do have a "vested right" in their 1985 judgment, all property interests are subject to infringement, as long as due

process is accorded. Due process is satisfied as long as Congress had a legitimate legislative goal which is accomplished by rational means. Pension Benefit Guaranty Board v. R.A. Gray & Co., 467 U.S. 717 (1984); Counsel v. Dow, 849 F.2d 731 (2d Cir. 1988) (HCPA); School Board of Prince William County v. Malone, 662 F. Supp. 999 (E.D. Va. 1987) (HCPA).

Moreover, even if the Eleventh Circuit was correct in invoking the "vested rights" principal, it is not the rigid rule as applied by the court. Rather, it is subject to a balancing test. The "vested right" concept has been criticized as a legal conclusion that should not be invoked until the balancing analysis has been undertaken. Reppy, supra, at 1048. Another commentator has suggested that if the legislative facts support a reasonable basis for the express retroactivity, the statute should be upheld, given the presumption of

constitutionality, and should not even be considered vulnerable to the "vested rights" approach. Greenblatt, "Judicial Limitations on Retroactive Civil Legislation," 51 N.W. L. REV. 540, 562 (1956). The proper analysis requires the application of the balancing test discussed above.

Neither McCullogh v. Virginia, 172 U.S. 102 (1898), nor Daylo v. Administrator of Veterans Affairs, 501 F.2d 811 (D.C.Cir. 1974), relied upon by the Eleventh Circuit, support the rigid doctrine applied by that court. Those cases each turned on the balance of their own special factors; in the present case, however, the Eleventh Circuit never performed that balancing. Such an analysis would have reached the conclusion of Counsel v. Dow, 849 F.2d 731, 738 (2d Cir. 1988), an HCPA case, which enumerated several reasons why retroactive fee awards further the goal of the EHA. In this case, filed by a class of handicapped

children and a public advocacy organization, an award of fees will allow the recovery of spent resources obtaining substantial relief for the severely retarded plaintiff children, and allow additional advocacy on behalf of handicapped children in Georgia.

The Eleventh Circuit opined that applying the HCPA to this case presented separation of powers problems, as well as due process problems. A statute does not present a separation of powers issue so long as the statute does not dictate a rule of decision in a specific case or mandate a judicial resolution of specific facts. United States v. Sioux Nation of Indians, 448 U.S. 371, 406 (1980); Moore v. D.C., 666 F. Supp. 263 (D.D.C. 1987), appeal filed, No. 88-7003 (D.C.Cir.) (HCPA); School Board of Prince William County v. Malone 662 F. Supp. 999 (E.D. Va. 1987) (HCPA). The HCPA does neither. On the

other hand, "Congress may invite a court to reconsider even when it may not dictate the outcome." Tonya K. v. Board of Education of City of Chicago, 847 F.2d 1243, 1247 (7th Cir. 1988) (HCPA).

Where constitutional rights are involved, Congress has even greater legislative authority. In Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984), a challenge to the constitutionality of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the court rejected a separation of powers argument, saying:

> So long as Congress adopts lawful...means to enforce the constitution, the separation of powers doctrine requires that the judiciary, rather than Congress, must defer...When Congress has wielded its authority under the fourteenth and fifteenth amendments, Justices of the Supreme Court have often differed over the wisdom or rationale for a measure, but the Court has usually upheld the Congressional action. (citing cases)

727 F.2d at 374.

In the instant case, the Eleventh

Circuit's rule results in unequal treatment of the plaintiffs, simply because they had the misfortune to have received an order at an earlier phase of litigation developments. Where there is a constitutional construction, as above, this result should be avoided.

In short, due process is not offended by the application of the HCPA to allow a petition for fees in this case. The Eleventh Circuit failed to undertake the requisite balancing test before invoking the "vested rights" doctrine, and further, failed to recognize the important public rights at issue. In a case such as the one at bar, which obtains class-wide injunctive relief, the fee award is an integral element of the relief, and will allow future advocacy on behalf of the class and other handicapped children. The balance of equities supports an application of the statute that not only effectuates congressional

intent but that also recognizes the efforts of class counsel to secure the "public," civil and constitutional rights of hundreds of children in the State of Georgia.

E. The Eleventh Circuit decision is inconsistent with other circuits on the issue.

No other court which has considered the HCPA s retroactivity provision has denied fees for work done prior to August 5, 1986, the effective date of the statute. The Eleventh Circuit's decision rests on a procedural quirk which is insufficient to distinguish it from decisions in other circuits which have applied the HCPA retroactively to award attorneys fees. In the Second, Seventh, and Ninth Circuits, fee awards under the HCPA were allowed notwithstanding the resolution of the merits of those cases between Smith and the enactment of the HCPA. Although in each case fees were not explicitly addressed, traditional res judicata principles would dictate that

the fee claim should have later been barred, unless either the HCPA retroactivity provision may constitutionally impact prior judgments, or the HCPA creates a new and distinct claim for fees. See, p. 54 et seq., infra.

In Counsel v. Dow, 849 F.2d 731 (2d Cir. 1988), the district court entered a post-Smith consent decree which did not mention fees. Subsequently, the plaintiffs moved for fees under the HCPA, and the circuit court affirmed the award of fees. In Abu-Sahyun v. Palo Alto Unified School District, 843 F.2d 1250 (9th Cir. 1988), the Ninth Circuit held that notwithstanding a post-Smith settlement agreement which made no provision for attorneys fees, the plaintiffs could recover fees under the HCPA.

In Tonya K. v. Bd. of Educ. of Chicago, 847 F.2d 1243 (7th Cir. 1988), the plaintiffs voluntarily withdrew their mo-

tion for fees following Smith. After the enactment of the HCPA, they filed a motion under FED. R. CIV. P. 60(b) requesting reinstatement of the fee petition. The Seventh Circuit affirmed the award of fees, although it acknowledged that had there been a decision on the fee issue, it would have had a "harder problem." The court felt that notwithstanding Rule 60(b), not every judgment is subject to reopening, else there would be no repose, and "every decision fixing interests in property [would be] forever malleable." Id. at 1248. Although the Seventh Circuit had an "easier" problem than that at bar in this case, the problem presented by the judgment in this case is not insurmountable -- it must, however, be approached with the balancing test established in the case law, and not by a simple declaration that a judgment is a vested right and therefore inviolable.

Finally, in Yaris v. Special School District of St. Louis County, 661 F. Supp. 996 (E.D. Mo. 1987), the district court found that FED. R. CIV. P. 60(b) authorized relief from the previous final judgment denying fees, based on Smith, because of the "exceptional circumstances" present where Congress explicitly reverses a Supreme Court decision. This was true even though the plaintiffs there, as here, had not moved under 60(b), but had denominated their motion as a "supplemental application for attorneys' fees."[9/] Other cases where fee claims were allowed are Unified School District v. Newton, 673 F. Supp. 418 (D. Kan. 1987), and Barbara R. v. Tirozzi, 665 F. Supp. 141 (D. Conn. 1987). See also, Shannon v. HUD, 433 F. Supp. 249 (E.D. Pa.

9/ See, 7 MOORE'S FEDERAL PRACTICE Par. 60.27[1], p. 60-271 (1983) (nomenclature is unimportant; moving papers may be treated as a motion under 60(b) even though mislabelled).

1977), aff'd, 577 F.2d 854 (3rd Cir.), cert. denied, 439 U.S. 1002 (1978) (fee claim under new statute permitted to be filed under Rule 60(b) notwithstanding earlier judgment denying fees).

F. The petitioners' failure to withdraw or appeal the judgment is not fatal to their claim.

The Eleventh Circuit suggested that the plaintiffs should have withdrawn their motion for fees or appealed the district court's judgment against them. The original complaint, however, had asserted an independent constitutional claim, under 42 U.S.C. § 1983, that the plaintiffs had been denied their due process right to invoke the administrative process. The plaintiffs believed that this claim could justify a fee award under 42 U.S.C. § 1988, pursuant to existing circuit precedent and therefore chose not to withdraw the petition at that time. See, Manecke v. School Board of Pinellas County, 762 F.2d 912 (11th Cir.

1985). Plaintiffs instead sought a stay from the district court pending expected congressional reaction to Smith.

Moreover, an appeal of the adverse fees judgment, in the face of Smith, might have subjected the plaintiffs to penalties for a frivolous appeal. As Moore states, "there seems to be agreement that a lower court judgment should not preclude relitigation if the right to appeal was destroyed by events beyond the control of the losing litigant...". 1B MOORE'S FEDERAL PRACTICE, Par. 0.416[1], p. 516 (1983).

II. THE HCPA CREATED A NEW CLAIM FOR ATTORNEYS FEES.

The Eleventh Circuit could have avoided the retroactivity issue altogether by acknowledging that the HCPA created a new claim for attorneys fees. The general preference is to avoid a constitutional issue if another construction is available. See, e.g., United States v. Security Industrial Bank, 459 U.S. 70, 83 (1982) (Blackmun,

J., concurring). Many decisions of this Court support such a result and this approach has been taken by some circuits under the HCPA. Counsel v. Dow, 849 F.2d 731 (2d Cir. 1988); Tonya K. v. Board of Education of Chicago, 847 F.2d 1243 (7th Cir. 1988); Abu-Sahyun v. Palo Alto Unified School District, 843 F.2d 1250 (9th Cir. 1988). See also, Yaris v. Special School District of St. Louis County, 661 F. Supp. 996, 999 (E.D. Mo. 1987). In Yaris, the court pointed out that an expressly retroactive change in statutory law creates a new cause of action, citing Pope v. United States, 323 U.S. 1, 9 (1944) and Utter v. Franklin, 172 U.S. 416, 19 S.Ct. 183, 186 (1899).

Under the American rule, recovery of attorneys fees from the losing party may only be had if there is statutory authority allowing fee-shifting. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S.

240 (1975). The circumstances of awards and range of discretion of the court is within the power of Congress to determine. Id. at 260 n. 33. Following Alyeska, any claim for the recovery of attorneys fees must have a statutory basis, either in the statute which is the basis of the substantive claim, such as the HCPA, or under a related "generic" fee statute, such as 42 U.S.C. § 1988. Parties may recover fees in a single case under more than one statutory or other basis. Hutto v. Finney, 437 U.S. 678 (1978). Subsequently enacted statutes can create entitlements to fees for work that pre-dated the statue, where no entitlement existed absent the statute. Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974).

It is incorrect, therefore, to say as the Eleventh Circuit did that a statute cannot create a new "claim" for attorneys' fees, since it is only by statute that such

a claim is created. 855 F.2d at 811. The right to state a claim for fees is an entirely separate matter, however, from the issue of whether fees should be awarded and in what amount.

Any doubt that Congress created a new entitlement is dispelled by considering what Congress did not do. Congress could simply have amended either 42 U.S.C. § 1988 or 29 U.S.C. § 794a to include EHA cases. Indeed, a separate section of the HCPA destroyed Smith's "exclusivity" rule and re-established the right to state claims under 42 U.S.C. § 1983 and 29 U.S.C. § 794. It would have been unnecessary to provide a new fee entitlement, had Congress not had something else in mind. Congress chose, however, to create a distinct entitlement to attorneys fees with its own parameters, including a limitation on hourly rates, fee-shifting for unreasonable rejection of settlement, and others. Most significant-

ly, Congress explicitly provided that a party prevailing in an administrative proceeding under the EHA could file an action in district court solely to recover attorneys fees. Under other fee-shifting statutes, this is not permitted. North Carolina Department of Transportation v. Crest Street Community Council, 479 U.S. 36 (1986).

Despite the statements of the Eleventh Circuit, the attorneys fee claim is not simply a discretionary gesture by the district court. Like many fee statutes, the HCPA provides that the district court "may" award fees. Case law under fee statutes with such wording limits the court's discretion to deny fees to instances of "special circumstances making an award unjust." In accordance with expressed congressional intent, this standard has been applied to the HCPA as well. Abu-Sahyun v. Palo Alto Unified School District, 843 F.2d 1250,

1252 (9th Cir. 1988); Yaris v. Special School District of St. Louis County, 661 F. Supp. 996 (E.D. Mo. 1987). The HCPA explicitly relies on those precedents. Thus in fact the district court has relatively little discretion as to whether or not to award fees if the plaintiff prevails; its only discretion concerns the amount of fees. As a new claim under the HCPA, the plaintiffs' motion in this case would not have been affected by the pre-existing judgment denying fees under 42 U.S.C. § 1988.

In summary, the fee petition denied by the district court in 1985 resolved only the question of the plaintiffs' entitlement to fees under 42 U.S.C. § 1988. The new claim under the HCPA did not exist at that time, and the plaintiffs should not have been precluded from asserting it after August 1986. The Eleventh Circuit unnecessarily raised constitutional issues

in construing the HCPA, failed to adopt a construction that would both fulfill the intent of Congress and uphold the statute, and decided this issue in conflict with other circuits. This Court should grant this Petition for Certiorari to correct this misinterpretation of a federal statute and rectify the injustice to the plaintiffs.

CONCLUSION

The Eleventh Circuit Court of Appeals has rendered a decision which improperly constricts the ability of Congress to enact curative legislation to deal with unexpected judicial interpretations of statutes. The court erroneously applied a per se rule which insulates rights acquired by judgments from such legislation, notwithstanding the explicit intent of Congress that the statute have retroactive effect, and notwithstanding the balance of factors which favors the plaintiffs in this case.

The plaintiffs here successfully enforced equal educational rights for a class of severely handicapped children in Georgia, and that service should be compensated so that plaintiffs' counsel may continue to represent aggrieved children under the EHA and the HCPA. This result was explicitly intended by Congress, and this Court should grant this Petition for Certiorari and address this issue.

Respectfully submitted,

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APPENDIX

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al., Plaintiffs-Appellants,

v.

Dr. Charles McDANIEL, in his official capacity as State Superintendent of schools, et al., Defendants-Appellees.

No. 87-8586

United States Court of Appeals, Eleventh Circuit.

Sept. 21, 1988

Appeal from the United States District Court for the Northern District of Georgia.

Before FAY and CLARK, Circuit Judges, and GUIN*, District Judge.

CLARK, Circuit Judge:

[1] This case concerns the retroactive application of the attorney's fee provision of the Handicapped Children's Protection Act ("HCPA") of 1986, 20 U.S.C. § 1415(e). Because Congress did not

* Honorable J. Foy Guin, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.

clearly express an intention to have the HCPA apply to final judgments rendered prior to the date the Act became law, we hold, in light of the constitutional difficulties that would otherwise arise, that the Act may not be so construed.

I.

This lawsuit was filed in 1978 to redress alleged violations of the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1401 et seq. and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. In an order dated April 3, 1981, the district court granted various forms of declaratory and injunctive relief to the plaintiffs. Georgia Association of Retarded Citizens v. McDaniel, 511 F.Supp. 1263 (N.D.Ga. 1981). A panel of this court affirmed the district court's judgment. 716 F.2d 1565 (11th Cir. 1983). The Supreme Court vacated our judgment and

remanded the case in light of its decision in Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984). See McDaniel v. Georgia Association of Retarded Citizens, 468 U.S. 1213, 104 S.Ct. 3581 82 L.Ed.2d 880 (1984). In Smith, the Court held that a plaintiff asserting a valid claim under the EHA could not seek attorney's fees under 42 U.S.C. § 1988 nor proceed simultaneously and seek fees under the Rehabilitation Act. On remand, we modified our opinion so as to make clear (1) that it affirmed only that portion of the district court's judgment granting relief under the EHA and (2) that a statement regarding the availability of attorney's fees was incorrect. Georgia Ass'n. of Retarded Citizens v. McDaniel, 740 F.2d 902, 903 (11th Cir. 1984) ("GARC III"), cert. denied, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 365 (1985).

Prior to the first appeal of this case to the Eleventh Circuit, the plaintiffs filed a motion in the district court for costs and attorney's fees. Upon motion by the local defendants, a ruling on this motion was stayed pending appeal. Subsequent to the issuance of the mandate in GARC III, the plaintiffs asked the district court to delay ruling on the motion for attorney's fees until Congress had time to act upon the bill which led to the enactment of the HCPA. In an order dated August 19, 1985, however, the district court, following Smith, denied the motion for attorney's fees.[1] No appeal was taken from this order.

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[1] The motion for costs is the subject of a separate appeal. See Georgia Association of Retarded Citizens v. McDaniel, slip op. 4681, ____ F.2d ____, No. 85-8582 (11th Cir. 1988).

The HCPA became effective on August 5, 1986. A few weeks thereafter, the plaintiffs filed a new motion for attorney's fees. In an order dated June 29, 1987, the district court held that the HCPA could not be construed as providing a basis for attorney's fees in this case because such a construction would have the effect of voiding the court's earlier, unappealed judgment denying attorney's fees.

II.

It is section 5 of the HCPA that makes section 2 of the Act expressly retroactive to the date of the Supreme Court's decision in Smith:

> Sec. 5.
>
> The amendment made by section 2 [providing for attorney's fees to prevailing parents in EHA actions] shall apply with respect to actions or proceedings brought under section 615(e) of the Education of the Handicapped Act after July 3, 1984, and actions or proceedings brought prior to July 4, 1984, under such section which were pending on July 4, 1984.

Public L. No. 99-372, 100 Stat. 796 (Aug. 5, 1986). The plaintiffs argue that this provision, tied directly to a specific date of a Supreme Court decision, compels the conclusion that Congress intended to remove all impediments to a recovery of attorney's fees by those whom the decision affected adversely.

In support of their position, the plaintiffs have seized upon certain language in Fontenot v. Louisiana Board of Elementary and Secondary Education, 805 F.2d 1222 (5th Cir. 1986), where Judge Goldberg discusses Congress' intent in enacting the HCPA:

> Congress read the Supreme Court's decision in Smith and acted swiftly, decisively, and with uncharacteristic clarity to correct what it viewed as a judicial misinterpretation of its intent.
>
> * * * * * * *
>
> In explicitly providing for attorney's fees, Congress reversed the outcome mandated by Smith for plaintiffs asserting claims to enforce rights that

> attach under the EHA. Moreover, to abrogate fully any residual effect of Smith, Congress made the amendments to the EHA effective retroactive to the date of the Smith decision.

Id. at 1223, 1224 (emphasis added). The factual and legal distinctions between Fontenot and this case are sufficient to make it certain that the last sentence of this statement is inapplicable here. First, in Fontenot, the appeal of the district court's first denial of attorney's fees was pending before the Fifth Circuit when Congress passed the HCPA. Thus, the question of the right to attorney's fees remained "live." Here, the plaintiffs did not appeal. Second, there was no constitutional challenge to the retroactive application of the Act. It is therefore clear that Judge Goldberg did not have in mind the legal question present here when he wrote that Congress intended to "abrogate" all effects of Smith.

One district court has read Fontenot in a manner favorable to the plaintiffs. Tatro v. State of Texas, ____ F. Supp. ____, E.H.L.R. Dec. 558:430 (N.D. Tex. 1987), as the plaintiffs note, is a "procedural twin" to this case. In Tatro, the court granted a motion for attorney's fees based on the HCPA, even though the Supreme Court, had reversed an earlier award of fees on the authority of Smith. See Irving Independent School District v. Tatro, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984). The defendants contested the retroactive application of the HCPA, raising what appears to be the same argument made by the defendants in this case. The court considered the Fontenot language quoted above to be dispositive. Yet, as we have explained, Fontenot is no authority for the proposition that the HCPA may constitutionally

alter the effect of a final judgment entered prior to Smith from which no appeal was taken.

In interpreting this provision, we are guided first by the principle, "expressed in varying degrees in strength," "that a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199, 34 S.Ct. 101, 102, 58 L.Ed. 179 (1913) (citations omitted), quoted in United States v. Security Industrial Bank, 459 U.S. 70, 79, 103 S.Ct. 407, 413, 74 L.Ed.2d 235 (1982). See also United Sates (sic) Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co., 209 U.S. 306, 314, 28 S.Ct. 537, 539 , 52 L.Ed. 804

(1908) ("The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.") While there can be no doubt that Congress intended the HCPA to receive retroactive application, these principles should govern the determination as to the precise scope of the Act's retroactive application, especially since we are also obliged, when it is "fairly possible," to construe a statute in a manner that does not call that statute into constitutional doubt. See Crowell v. Benson, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932); Califano v. Yamasaki, 442 U.S. 682, 693, 99 S.Ct. 2545, 2553, 61 L.Ed.2d 176 (1979).

The question is simple to pose: did Congress, by the language contained in the HCPA's retroactivity provision, intend for

the HCPA to apply to cases in which final, unappealed judgments had been rendered prior to the statute's enactment date? The language of the HCPA's retroactivity provision is certainly not conclusive. Congress did not expressly provide that the Act should so apply.[2] If the Act were to be interpreted in the manner urged by the plaintiffs, one would be required to conclude that the Congress intended to

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2. Nor does the legislative history support the position that Congress intended to affect final judgments. Senator Weiker, the sponsor of both the original EHA and HCPA explained that the latter Act was "intended to be a simple restoration and clarification of congressional intent." Handicapped Children's Protection Act of 1985: Hearing on S. 415 Before the Subcomm. on the Handicapped of the Comm. on Labor and Human Resources, 99th Cong. 1st Sess. 2 (1985). The senator's views are also amply reflected in the Senate Report accompanying S. 415 which was passed in lieu of a similar House bill:

[Footnote continued on following page.]

"reverse" the outcome in the Smith case itself, giving the Smith plaintiffs a second chance at attorney's fees when the

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[Footnote 2 continued from preceding page.]

Congress' original intent was that due process procedures, including the right to litigation if that became necessary, be available to all parents. On July 5, 1984, the Supreme Court, in Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457 [82 L.Ed.2d 746] (1984), determined that Congress intended that the EHA provide the exclusive source of rights and remedies in special education cases covered by that act. The effect of this decision was to preclude parents from bringing special education cases under section 504 of the Rehabilitation Act of 1973, and recovering attorney's fees available under section 505 of that act, where relief was available under the EHA.

Specifically, in Smith v. Robinson, the Court ruled that when a remedy "provided under section 504 is provided with more clarity and precision under EHA, a plaintiff may not circumvent or enlarge on the remedies available under EHA by resort to section 504." The Court reasoned that the comprehensiveness and detail with which EHA addresses the

[Footnote 2 continued on following page.]

Supreme Court had held they were entitled to none. As we explain below, Congress may not - and typically does not - undertake to "reverse" the result that obtains in a particular Supreme Court

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[Footnote 2 continued from preceding page.]

> provision of special education for handicapped children implies that Congress intended to limit remedies to those explicitly provided for in the EHA.
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> The situation which has resulted from the Smith v. Robinson decision was summarized by Justices Brennan, Marshall, and Stevens in their dissenting opinion: "Congress will now have to take the time to revisit the matter." Seeking to clarify the intent of Congress with respect to the educational rights of handicapped children guaranteed by the EHA, the Handicapped Children's Protection Act of 1985 was introduced on February 6, 1985. . . . On June 11, 1985, the Subcommittee unanimously reported S. 415 with amendment to the full Committee. On July 10, 1985, the full Committee unanimously moved to order the bill, as amended, reported to the Senate.

S.Rep. No. 112, 99th Cong., 1st. Sess. 2, reprinted in 1986 U.S.Code Cong. & Admin.News 1798, 1799.

decision. We doubt that it intended to do so in passing the HCPA.

[2] To be sure, the Act is to apply to all cases "pending" on July 4, 1984. On that date this case was before the Supreme Court, certiorari having been granted simultaneously with the resolution of the merits on July 5, 1984. As the Supreme Court has explained, however, "'[p]ending' is simply not a term of art that unambiguously carries with it [any one] meaning." International Union of Electrical Workers v. Robbins & Myers Inc., 429 U.S. 229, 243, 97 S.Ct. 441, 450, 50

[Footnote 2 continued from preceding page.]

The views expressed in these fragments show that Congress disagreed fundamentally with Smith and considered it a misinterpretation of the EHA. They do not suggest, however, that Congress intended - or even believed it had the power - to reach those cases decided on the basis of Smith that had become unappealable.

L.Ed.2d 427 (1976) ("pending" EEOC charge could be one which was "not yet rejected" on date of legislation). We conclude that, for the purposes of section 5 of the HCPA, the class of cases "pending" on July 4, 1984 does not include a case in which a final judgment as to attorney's fees was rendered and became unappealable before August 5, 1986.

We are not the first court of appeals to so interpret legislation made retroactive to all proceedings "pending" on a given date. Such a course was followed by the D.C. Circuit in Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811 (D.C. Cir. 1974). In Daylo, a veteran's widow had brought suit in 1969 to compel payment of certain death compensation benefits which had been denied her for many years. Legislation passed by Congress in 1962 required a widow to prove that she had not

remarried before she could receive these death benefits. This statute was applied prospectively (after 1962) only. Thus, the district court granted summary judgment to Mrs. Daylo with respect to all benefits which had accrued prior to 1960. The Administrator of Veterans' Affairs did not appeal this judgment. The district court gave the Administrator 120 days to comply with its order. Before this period had elapsed, Congress enacted 38 U.S.C. §§ 211(a) and 3111 (1970). The first of these statutes made certain decisions of the Administrator as to any "question of law or fact under any law administered by the [VA] providing benefits for veterans and their . . . survivors" conclusive; it also withdrew federal court jurisdiction to review such decisions; the second had the effect of shifting to a veteran's widow the burden of providing that she had not

remarried with respect to all pre-1962 instances of alleged remarriage. Armed with these two statutes, the Administrator filed a motion under Fed.R.Civ.P. 60(b) to seek relief from the district court's judgment as to pre-1962 benefits. The Administrator argued that the first statute conflicted with the judgment in favor of Mrs. Daylo "by retroactively withdrawing jurisdiction of the court which [had] entered [it], thus rendering [it] void." 501 F.2d at 815. He also argued that the second absolutely prohibited the payment ordered by the district court.

The court concluded that, although Congress had made the "no review" provision of 38 U.S.C. § 211(a) retroactive to 1940, these statutes could not properly be interpreted as expressing a congressional intent to annul those judgments based on prior law. The court acknowledged that it

was "conceivable that Congress intended such judgments to fall," but it held that because such "intent was nowhere clearly expressed," this construction was to be avoided in light of the constitutional difficulties that this construction would pose. Id. at 823.

As in Daylo, it is conceivable that Congress intended to annul those judgments based on Smith that became final, and unappealable prior to the HCPA's date of enactment. In light of the fact that Congress did not clearly express such an intent, the constitutional difficulty associated with this interpretation require the Act to be construed otherwise.

III.

[3] If, as the plaintiffs claim, the HCPA was designed to reach cases such as this one, it would conflict manifestly with a longstanding [sic] rule which insulates

certain adjudicated rights from the reach of the legislature. As the Supreme Court explained in McCullough v. Virginia, 172 U.S. 102, 123-24, 19 S.Ct. 134, 142, 43 L.Ed. 382 (1898).

> It is not within the power of the legislature to take away rights which have been once vested by judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

The constitutional dimension of this principle, sometimes labelled the "vested rights" doctrine, is twofold. First, it recognizes that rights fixed by judgment are, in essence, a form of property over which legislatures have no greater power than any other. See Tonya K. v. Board of Education of City of Chicago, 847 F.2d 1243, 1247 (7th Cir. 1988)(citing Hodges v. Snyder, 261 U.S. 600, 43 S.Ct. 435, 67 L.Ed. 819 (1923)). Second, consistent with

the separation of powers, it protects judicial action from superior legislative review, "a regime [that would be] obviously inconsistent with due process of law and subversive of the judicial branch of government." Daylo, 501 F.2d at 816. See also United States v. Board of Education of City of Chicago, 588 F.Supp. 132, 235 (N.D. Ill. 184)(rule protects finality and independence of judicial action); Personal Finance Co. of Braddock v. United States, 86 F.Supp. 779, 784 (D.Del.1949) (retroactive application of legislation to "past controversies" constitutes unauthorized exercise of judicial power).

Following these general principles the district court ruled that the retroactive application of the HCPA urged in this case would, if permitted, have the effect of voiding the district court's prior

unappealed judgment based on Smith.[3] The plaintiffs have launched various attacks against the district court's judgment and have offered explanations as to how the HCPA may be constitutionally construed so as to apply to this case. We now turn to those arguments.

The plaintiffs' first argument depicts the district court's judgment as erroneous

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[3] We note that the district court did not, as is required by 28 U.S.C. § 2403(a) and Fed.R.Civ.P. 24(c), notify the Attorney General that this case raised a question of the HCPA's constitutionality. Section 2403(a) and Rule 24(c) are designed to permit the United States to intervene whenever "the constitutionality of an Act of Congress affecting the public interest is called into question." 28 U.S.C. § 2403(a). "Giving of this notice is mandatory, even if the court thinks the constitutional question frivolous, but failure to give the notice does not deprive the court of jurisdiction in the case." C. Wright, A. Miller & M. Kane 7C Federal Practice and Procedure § 1915 (1986). We are likewise not deprived of jurisdiction

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application of the principles of res judicata. Notably, the district court's order makes no reference to res judicata. Nonetheless, the plaintiffs contend that the right to attorney's fees created by the HCPA creates a new "claim" or "cause of action" for attorney's fees distinct from that adjudicated by the district court in 1985. This argument is based on the concept that "changed circumstances" may

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[Footnote 3 continued from preceding page.]

to decide this appeal. Since we are not striking down any portion of the HCPA, "there seems to be no practical purpose to be served in remanding the case to the Court below with directions to allow intervention by the United States." Thatcher v. Tennessee Gas Transmission Co., 180 F.2d 644, 648 n. 7 (5th Cir.), cert. denied, 340 U.S. 829, 71 S.Ct. 66, 95 L.Ed. 609 (1950). Nonetheless, when circumstances such as this have arisen in the past, to fulfill the purposes of section 2403(a), we have afforded the United States an opportunity to intervene so that it may participate in any further review by

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sometimes alter the preclusive effect of a prior judgment. As Professor Moore has explained,

> Sometimes a statutory change or constitutional amendment creates a new cause of action or a new procedure for enforcing a right, or authorizes an additional means of executing a judgment, and to that extent diminishes the conclusive effect of a prior judgment or decree. Whether or not a particular statute makes the conclusive effect of prior judgments inapplicable to later suits depends on legislative intent.

[Footnote 3 continued from preceding page.]

this court or by the Supreme Court. Id. We will instruct our clerk of court, upon issuance of this opinion, to certify a copy to the Attorney General. Should the Attorney General conclude that intervention is called for, we will entertain a petition for rehearing on behalf of the United States. The Attorney General shall have sixty days in which to file such a petition. See also Jones v. City of Lubbock, 727 F.2d 364, 372 (5th Cir. 1984); cf. Bridges v. Phillips Petroleum Co., 733 F.2d 1153, 1156 n. 7 (5th Cir. 1984) (adopting same procedure where district court failed to follow 28 U.S.C. § 2403(b), which permits state attorney general to intervene where state statute's constitutionality is questioned), cert. denied, 469 U.S. 1163, 105 S.Ct. 921, 83 L.Ed.2d 933 (1985).

1B Moore's Federal Practice Para. 0.415 at 511 (1984). What appears to unite the cases decided under this rule, as well as those in which other "changed circumstances" are said to alter the preclusive effect of a judgment, is the notion that "no judgment can affect subsequently arising rights and duties." Id. Para. 0.415 at 508 (emphasis added).[4] It is

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[4] Thus, to use Professor Moore's examples, a judgment reversing on constitutional grounds a decree that confirmed a plan of composition in Bankruptcy, did not bar a subsequent proceeding for confirmation of an identical plan of composition, under a newly acted Bankruptcy code provision, because the new provision created a new cause of action "that could not have been adjudicated in the prior suit." 1B Moore's Federal Practice Para. 0.415 at 510 (1984) (citing West Coast Life Ins. Co. v. Merced Irrigation District, 114 F.2d 654 (9th Cir. 1940), cert. denied, 311 U.S. 718, 61 S.Ct. 441, 85 L.Ed.2d 467 (1941)). Similarly, a judgment dismissing an alien's suit for

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clear, however, that this case does not present "changed circumstances," as this term is commonly understood. To illustrate, we note that the plaintiffs have mischaracterized their purported right to attorney's fees under the HCPA as one involving a new "cause of action." Strictly speaking, the HCPA does not create a "cause of action" or a substantively independent "claim" for attorney's fees. Like many similar statutes, see, e.g., 42 U.S.C. § 1988, it merely confers upon district courts the discretionary power to

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declaratory judgment on the ground that an exclusion order was reviewable only by a writ of habeas corpus did not bar a later suit, "for identical relief on the same facts brought after the enactment of a statute creating a right to declaratory relief." Id. Para. 0.415 at 510-11 (citing Shung v. Brownell, 227 F.2d 40 (D.C.Cir. 1955), aff'd. 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed.2d 225 (1956)).

award attorney's fees to prevailing litigants.

Congress does have clear power to create new legal rights and duties, even when imposed upon conditions that are "bred in the past." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-18, 96 S.Ct. 2882, 2892-93, 49 L.Ed.2d 752 (1976). Pursuant to this power, Congress may create an obligation to pay attorney's fees for services rendered in the past, while a case is on direct review. Bradley v. School Board of City of Richmond, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). But Congress' power to create new causes of action, new legal rights, or impose previously unrecognized duties, does not permit it to disturb a right that vests as the result of a judgment.

The well established exceptions to this rule are inapplicable to this case. The

first such exception arises where Congress chooses to "waive the res judicata of a prior judgment, entered in the [United States'] favor on a claim against the United States." United States v. Sioux Nation of Indians, 448 U.S. 371, 397, 100 S.Ct. 2716, 2731, 65 L.Ed.2d 844 (1980). See also Cherokee Nation v. United States, 270 U.S. 476, 46 S.Ct. 428, 70 L.Ed.694 (1926). It is one thing for Congress to waive the preclusive effect of a judgment that the United States is without a certain obligation. It would be another were Congress to purportedly waive the effect of a judgment in favor of individuals, in this case local and state school authorities. In the former situation, there is no constitutional impediment because Congress is acting within the scope of powers conferred upon it by the Constitution. Congress has a broad power to "define and

to 'pay the Debts ... of the United States.'" Sioux Nation, 448 U.S. at 397, 100 S.Ct. at 2731 (quoting U.S. Const. art. I, Para. 8, cl.1); see also Pope v. United States, 323 U.S. 1, 9-10, 65 S.Ct. 16, 21, 89 L.Ed. 3 (1944).

The second exception to the rule regarding rights which vest as a result of a judgment arose out of the Wheeling Bridges cases. These cases concerned the competing efforts by Pennsylvania and Virginia to have the Cumberland Road - a major highway of the day - built inside their territories at the point where it crossed the Ohio River. In 1847, the Virginia legislature chartered a corporation to build a bridge across the river. In the first Wheeling Bridge case, 54 U.S. (13 How.) 518, 14 L.Ed. 249 (1852) (Wheeling Bridge I), Pennsylvania sued to have the bridge's construction enjoined.

After the case was argued, the bridge already having been completed, the Court held that the bridge impermissibly obstructed interstate navigation and ordered it raised to a certain height. Virginia sought assistance from Congress and in a rider to a post office appropriation bill, Congress declared the bridge to be a lawful structure and a designated post road. After the bridge collapsed in 1854, Pennsylvania sued to enjoin its reconstruction.[5] In the second Wheeling Bridge case, 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1855) (Wheeling Bridge II), the Supreme Court held that it was within Congress' power to legalize the bridge retroactively, in spite of the

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[5] For the complete history behind the cases, see C. Swisher, 5 History of Supreme Court of the United States 408-20 (1974).

Court's earlier decree ordering that the bridge be raised.

The Court accepted the principle articulated in McCullough: "that [an] Act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of [one of the parties]." Id. at 431, 15 L.Ed. at 437. This class of cases was distinguishable, the Court held, because they concern "private" rather than "public" rights, such as the "right of navigation," which are "secured by Acts of Congress." Id. Thus the Court's Wheeling Bridge I decree was vulnerable to retroactive legislation, but "only to the extent that the remedy chosen - an injunctive decree rather than damages at law - directly affected public rights." Daylo, 501 F.2d at 817. Had a party sued successfully for damages

resulting from the obstruction posed by the bridge, a private right would have vested, and this right "would have passed beyond the reach of the power of congress." Wheeling Bridge II, 59 U.S. at 431-32. 15 L.Ed. at 437. Accordingly, even though Congress could effectively overturn the result in the first case, the award of costs made to the State of Pennsylvania was not to be disturbed. Id. at 436, 15 L.Ed. at 439. See also, Hodges v. Snyder, 261 U.S. 600, 603-604, 43 S.Ct. 435, 436-37, 67 L.Ed.819 (1923) (drawing public/private rights distinction; judgment for costs left undisturbed).

This case does not concern a public right over which Congress has unfettered control nor one which was the subject of an equitable decree. Like an award of damages, or an award of costs, the right to receive - and conversely, the right not to

pay - attorney's fees is, in the parlance of these cases, a private right not subject to divestiture by retroactive legislation.

One other court of appeals has faced the question whether the HCPA's retroactivity provision impermissibly disturbed vested rights. The underlying merits of Tonya K. v. Board of Education of City of Chicago, 847 F.2d 1243 (7th Cir. 1988) were settled by the parties and the district court entered a consent judgment providing, inter alia, that the issue of attorney's fees was reserved pending the Supreme Court's decision in Smith. Recognizing that Smith "doomed" their request for attorney's fees, the plaintiffs withdrew their request. No judgment was entered with respect to attorney's fees nor was the consent decree modified after the request was withdrawn. After the enactment of the HCPA, the plaintiffs filed a motion under

Fed.R.Civ.P. 60(b)(6), requesting that the district court reinstate their request for fees. Although the district court acknowledged it was an extraordinary form of relief, it opened the judgment and made an award of attorney's fees.

The defendants attacked the award on a number of grounds, including the one we are presently considering. The Seventh Circuit held that because there had never been a "judicial disposition of the request for fees," the defendants had no vested right to be free from the payment of attorney's fees 847 F.2d at 1248. The court indicated, however, that a different result would have obtained if, as is the case here, the plaintiffs had pushed their request to judgment. See id. ("If the plaintiffs had pressed their claim in July 1984 and lost, we would have a harder problem.").

Congress has broad powers to supply, amend, or extinguish the great body of substantive rules applied by the courts. When it so intends, its ability to affect the content of a nonfinal judgment in a civil case, through retroactive legislation ceases only when a case's journey through the courts comes to an end. As the Supreme Court explained in United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801).

> If subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied .... [T]he court must decide according to existing laws, and if it be necessary to set aside the judgment, rightful when rendered, but which cannot be affirmed, in violation of law, the judgment must be affirmed.

This rule is the same regardless of whether the change in law is statutory, administrative, judicial, or the result of an intervening treaty. See de Rodulfa v.

United States, 461 F.2d 1240, 1250 n. 50 (D.C. Cir.)(listing cases), cert. denied, 409 U.S. 949, 93 S.Ct. 270, 34 L.Ed.2d 220 (1972). As this court has said in another context, "[u]ntil appellate rights are exhausted, even an otherwise valid judgment may be negated by supervening legislation." Memorial Hospital v. Heckler, 706 F.2d 1130, 1137 (11th Cir. 1983), cert. denied, 465 U.S. 1023, 104 S.Ct. 1275, 79 L.Ed.2d 680 (1984).

IV.

We recognize that the result in this case works a hardship for the prevailing parents. The initial denial of attorney's fees was based on an interpretation of the EHA which Congress has acted to correct. Yet no matter how erroneous in the eyes of Congress, the Supreme Court's decision in Smith was absolute authority from which the district could not stray.

The result seems particularly harsh in light of the fact that many similarly, if not identically, situated plaintiffs will be eligible for attorney's fees. Nonetheless, the plaintiffs in this case must bear some responsibility for failing to preserve any rights to attorney's fees which might have accrued under HCPA. Once the mandate issued in GARC III the plaintiffs continued to press their motion for fees in the face of Smith, which was clear authority contrary to their request. Had they withdrawn their request for fees, like the Tonya K. plaintiffs, they might have later sought them pursuant to the HCPA. Such an occurrence is not without precedent in this circuit. See Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981).[6]

In any event, our decision today in no way prejudices the rights of the plaintiffs to recover attorney's fees for other

nonfinal proceedings that were pending on or commenced after the date of Smith. On May 25, 1983, for example, the plaintiffs in this case filed a petition for "Additional Relief or in the Alternative Civil Contempt" for an alleged violation of the district court's April 6, 1981 injunction. At the time the record in this case was transmitted to our court, this request for relief was still pending. Inasmuch as this petition is "a proceeding[] brought under section 615 of

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[6] Robinson was a jury discrimination case. Most of the litigation took place prior to the enactment of 42 U.S.C. § 1988 in 1976. After the underlying merits were resolved by our court, Robinson v. Kimbrough, 558 F.2d 773 (5th Cir. 1977) (in banc), the plaintiffs filed a motion in the district court for section 1988 fees. We held that such a motion was proper because "at no time [had] any court address[ed] the merits of the plaintiff's claim for attorneys' fees." 652 F.2d at 463.

the [EHA]," the plaintiffs, should they prevail, can request attorney's fees under the HCPA for the legal work associated with this petition. The district court's August 19, 1985 order did not relieve the defendants from any liability for fees resulting from proceedings not comprehended in that order.

The judgment of the district court is AFFIRMED.[7]

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[7] Given our disposition of this case, we have no occasion to reach the other issues reached by the district court and argued by the parties.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-8586

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,
Plaintiffs-Appellants.

versus

DR. CHARLES McDANIEL, In his official capacity as State Superintendent of Schools, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Opinion September 21, 11 Cir., 1988, ____ F.2d ____). (January 5, 1989)

Before FAY and CLARK, Circuit Judges, and GUIN*, District Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on

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* **Honorable J. Foy Guin, Jr., U.S. District Judge for the Northern District of Alabama, sitting by designation.**

the court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/S/
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,	:	
Plaintiffs,	:	CIVIL ACTION FILE NO.
vs.	:	C78-1950A
DR. SYLVESTER RAINS, in his official capacity as Superintendent of the Savannah Chatham County Board of Education; DR. DONALD KNAPP, DR. MARTHA FAY, REV. WILLIAM F. STOKES, III, EMMA ADLER, CAPTAIN ROBERT FUND, ESTER F. GARRISON, SPENCER LAWTON, JR., in their official capacities as Members of the Savannah Chatham Board of Education; and THE SAVANNAH-CHATHAM BOARD OF EDUCATION,	:	
Defendants	:	

ORDER OF COURT

After trial on the merits, judgment was entered in the above-styled action on April 6, 1981. On June 15, 1981 plaintiffs filed a motion for award of

costs and attorneys' fees. Defendants moved to stay such consideration until the completion of the appellate process, and on August 14, 1981 the court granted such a stay. Following final denial of certiorari by the Supreme Court on February 19, 1985, the parties, at the direction of the court, filed additional briefs, and the matter is now ready for final ruling by the court.

Plaintiffs seek reimbursement of $54,823.00 in attorneys' fees and $10,802.13 in costs, consisting of filing fees, expert witness fees, and the cost of obtaining certain deposition transcripts, a copy of the trial transcript, and copies of other documents. Plaintiffs seek award of fees and costs only against the above-named local defendants. Defendants object to the request for attorneys' fees, expert witness fees, and the cost of the trial transcript.

A. Attorneys' Fees

Defendants object to the plaintiffs' request for attorneys' fees on the basis of the Supreme Court's decision in Smith v. Robinson, 468 U.S. ____, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984). In Smith v. Robinson, the Supreme Court held that attorneys' fees are not awardable in an action arising under the Education for All Handicapped Children Act ("Handicapped Act"), 20 U.S.C. §1401, et seq., the only act under which plaintiffs ultimately prevailed in this case.

Plaintiffs have filed a motion to stay the attorneys' fee petition until Congress acts upon a bill currently pending which would arguably authorize an award of attorneys' fees in this action. The court finds no authority for staying consideration of the petition for attorneys' fees because of a bill pending in Congress which

may, if passed by Congress and approved by the President, at some later date, affect the issues presented in the petition. The court declines to stay the petition for attorneys' fees and finds that such fees may not be awarded in this case.

B. Fees of Expert Witnesses

Plaintiffs seek to tax witness fees for their experts in the amount actually charged, totaling $5,513.50. The usual rule in civil litigation in federal courts is that such fees are not recoverable as costs, and experts are compensable only at the same rate as other witnesses as established by 28 U.S.C. §1821. Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir.), cert. dismissed, 453 U.S. 950 (1981).

However, the Fifth Circuit recognized in Jones v. Diamond that:

Congress has manifested an intention that a different rule be applied in civil rights litigation:

> "If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate those rights in court."

S.Rep. 94-1101, 94th Cong. 2d Sess. 2, **reprinted in** U.S. Code Cong. & Ad. News, pp. 5908, 5910. District courts in many instances have awarded the full fees of experts on the ground that their testimony and assistance were necessary or helpful in representing clients in civil rights litigation.

Counsel must have the assistance of experts to furnish effective and competent representation. In most civil rights litigation . . . expert testimony is a vital ingredient in the proper presentation and decision of a case. Without the ability to recover experts' fees, plaintiffs . . . will be unable to bring these cases.

636 F.2d at 1382. (citations omitted).

See also Berry v. McLemore, 670 F.2d 30 (5th Cir. 1982). The Handicapped Act was designed to protect the same type statutory and constitutional interests as 28 U.S.C. §1983, which was the basis of liability in Jones. The purpose of the Act was "to establish and protect the right to education for all handicapped children and to provide assistance to the states in carrying out their responsibilities under state law and the Constitution of the United States.[1] U.S. Code Cong. & Ad. News 1975, p. 1437 quoted in Smith v. Robinson, supra at 3468. As the Supreme Court noted in Smith v. Robinson, "Congress intended

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[1] Congress enacted the EHA, with its panoply of procedures, to clarify and make enforceable the handicapped child's right to a free appropriate public education. This right is granted in the Equal Protection Clause. Manecke v. School Bd. of Pinellas City, Florida, No. 84-3507 (11th Cir., June 11, 1985).

the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education," 104 S.Ct. 3468, in fact precluding §1983 as a statutory remedy for the deprivation of this constitutional right. Like §1983, the Handicapped Act was enacted to provide a vehicle for individuals to ensure that their fundamental constitutional rights are protected. The Jones analysis applies to an action under the Handicapped Act.

A central issue in this case was whether a policy or practice of failing to consider or provide for the needs of mentally retarded children for education in excess of 180 days per school year violated the Handicapped Act. GARC v. McDaniel, 511 F. Supp. 1263 (N.D. Ga. 1981), aff'd, 716 F.2d 1565 (11th Cir. 1983), vacated 104 S.Ct. 3581 (1984), on remand, 740 F.2d 902

(11th Cir. 1984), cert. denied, 53 U.S.L.W. 3599 (Feb. 19, 1985). Plaintiffs produced a considerable amount of expert testimony in order to establish that mentally retarded children can suffer educational regression during interruptions in their educational programming, with direct consequences on their progress and development. Based in part upon this testimony, the court held that an across-the-board policy limiting the provision of schooling to 180 days and prohibiting consideration of a child's needs beyond 180 days violates the Handicapped Act. Given the complex and technical nature of the subject, such expert testimony and assistance was essential to the effective presentation of the plaintiffs' case. The requested amount is reasonable considering the nature and

quality of the expert assistance provided to the court.[2]

In opposing plaintiffs' application for reimbursement of expert witness fees, defendants rely upon Kivi v. Nationwide Mutual Insurance Co., 695 F.2d 1285 (11th Cir. 1983). Kivi is not controlling in this case. Kivi was an insurance case and was not based on a constitutional deprivation. Therefore, the decision in Kivi does not supercede the precedent established by Jones v. Diamond. Further, Kivi was decided by a panel of the Eleventh Circuit, and precedent established by the Fifth Circuit before the Eleventh Circuit, came into existence can "not be overruled by a panel but only by the court sitting en

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[2] Further, the court notes that expert witnesses for whose fees plaintiffs seek reimbursement reduced their ordinary fees or reduced the amount of time for which they billed the plaintiffs.

banc". Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981).

C. Transcript Costs

The cost of a transcript "necessarily obtained for use in the case" is taxable as part of costs. 28 U.S.C. §1920(2). It is within the discretion of the court to award the cost of obtaining portions of the trial transcript when such was necessary for the purpose of appeal. Berner v. British Commonwealth Pacific Airlines, Ltd., 362 F.2d 799 (2nd Cir.), cert. denied, 385 U.S. 948 (1966); North River Ins. Co. v. St. Paul Fire and Marine Ins. Co., 476 F. Supp. 399 (D.S.D. 1979). See also 6 Moore's Federal Practice, Para. 54.77(7).

In determining whether to allow the expense of a transcript, courts should consider whether it was necessary to the effective performance of counsel and for

proper handling of the case. Marcoin, Inc. v. Edwin K. Williams Co., Inc., 88 F.R.D. 588 (D.C. Va. 1980). The portion of the transcript obtained by plaintiffs concerned the extensive testimony regarding the necessity of year-round education for retarded children. Considering the complexity of the factual issues raised before this court and the extensive use of the transcript during the trial, in preparation for post-trial motions, and throughout the extensive appellate process, the court finds that the trial transcript was necessarily obtained for use in the case. Accordingly, its costs is properly taxable against the defendants.

CONCLUSION

In conclusion, plaintiffs' motion for award of costs and attorneys' fees is **GRANTED IN PART** and **DENIED IN PART.** Plaintiffs will not be permitted to recover

attorneys' fees. The following costs are properly taxable against the defendants.

(A)	Fees of the Clerk	$ 60.00
(B)	Fees of the court reporter for the trial transcript	1,540.00
(C)	Fees for witnesses	350.00
(D)	Copy costs	350.00
(E)	Costs incident to deposition	3,141.13
(F)	Fees for expert witnesses	5,328.50
(G)	Docket fees under 28 U.S.C. §1923	32.50
		$10,802.13

Therefore, the clerk of the court is **DIRECTED** to tax $10,802.13 as costs against the above-named (local) defendants and in favor of the plaintiffs.

SO ORDERED, this /16th/ day of April, 1985.

/S/
HORACE T. WARD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,	:	
Plaintiffs	:	CIVIL ACTION
vs.	:	FILE NO. C78-1950A
DR. CHARLES MCDANIEL, et al.,	:	
Defendants	:	

ORDER OF COURT

By Order of August 19, 1985, the court denied plaintiffs an award of attorneys' fees in this action but did award to plaintiffs and taxed as costs to defendants certain expert witness fees and the fees of the court reporter for a trial transcript. The matter is now before the court on plaintiffs' motion for reconsideration of the denial of attorneys' fees and defendants' motion for reconsideration of the taxation against defendants of expert witness fees and transcript costs.

Attorneys' Fees

Plaintiffs cite Manecke v. School Board of Pinellas County, Florida, 762 F.2d 912 (11th Cir. 1985), in support of its proposition that Smith v. Robinson, 468 U.S. ____, 104 S.Ct. 3457 (1984) does not prohibit the awarding of attorneys' fees to plaintiffs in this action. Manecke and the cases which it relies involve situations where the plaintiffs were deprived completely of "access to the heart of EHA administrative machinery, the impartial due process hearing," and therefore the plaintiffs could bring an action under §1983. As plaintiffs in this action have not been deprived of access to the EHA administrative machinery, Maneke (sic) does not provide support for plaintiffs' position. Under Smith, plaintiffs may not recover attorneys' fees in this action. Plaintiffs' motion for reconsideration is **DENIED.**

Transcript Costs

The cost of a transcript "necessarily obtained for use in the case" is taxable as part of costs. 28 U.S.c. (sic) §1920(2). Considering the complexity of the factual issues raised before this court and the extensive use of the transcript during trial, in preparation for the numerous post-trial motions, and throughout the extensive appellate process, the transcript was necessarily obtained for use in the case and was therefore properly taxed against the defendants.

Expert Witness Fees

The usual rule in civil litigation in federal courts is that expert witness fees are not recoverable as costs, and experts are compensable only at the same rate as other witnesses as established by 28 U.S.C. §1821. This court, extending the exception to this rule recognized in

Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir.), cert. dismissed, 453 U.S. 950 (1981) to the present action, awarded plaintiffs the full fees of their expert witnesses. The court in Jones found that Congress had manifested an intention that expert witness fees be awardable in civil rights litigation, based primarily on the concern expressed in the legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C., §1988, that "if private citizens are to be able to assert their civil rights . . .[they] must have the opportunity to recover what it costs them to vindicate those rights in court." 636 F.2d at 1382, quoting S.Rep. 94-1011, 94th Cong., 2d Sess. 2, reprinted in U.S. Code Cong. & Ad. News, at 5910. Defendants now argue that implicit in the decision of Congress not to provide for the award of attorneys' fees in EHA litigation is an

intention not to provide for the award of expert witness fees in such litigation. Defendants' argument is persuasive. While the policy expressed in Jones would seem to apply to the present action, it would be an anomalous position to hold that Congress intended to allow the taxation of expert witness fees in order to ensure citizens would have the opportunity to vindicate their rights under the EHA while it declined to allow such plaintiffs to recover attorneys' fees, which are normally a more substantial cost. Plaintiffs' expert witness fess (sic) are taxable only at the rate established by 28 U.S.C. §1821.

Defendants' motion for reconsideration is **GRANTED IN PART** and **DENIED IN PART**. As to the transcript cost, defendants' motion is **DENIED**. As to plaintiffs' expert witness fees, defendants' motion is **GRANTED**. The court's Order of August 19,

1985 is hereby **MODIFIED** so as to delete the taxation in favor of plaintiffs and against defendants of $5,328.50 for fees of expert witnesses. Plaintiffs are **DIRECTED** to submit within fifteen (15) days of receipt of this order a bill of costs stating the amount of fees and costs of their expert witness which is properly taxable pursuant to 28 U.S.C. §1821. Defendants may file a brief within ten (10) days of receipt of plaintiffs' bill of costs responding to that document. After the time in which defendants may respond to plaintiffs' bill of costs has run, the clerk is **DIRECTED** to resubmit this matter, and at that time the court will determine the costs properly taxable against defendants.

SO ORDERED, this 27th day of November, 1985.

/S/
HORACE T. WARD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA ASSOCIATION OF RETARDED CITIZENS, et al.,	)	
Plaintiffs,	)	**CIVIL ACTION**
v.	)	**FILE NO. C78-1950A**
DR. CHARLES McDANIEL, et al.,	)	
Defendants.	)	

ORDER OF COURT

Currently pending before the court is plaintiffs' request for attorneys' fees. As the court has bifurcated resolution of the issues raised by plaintiffs' request, the matter is now before the court on the issues of whether plaintiff is legally entitled to attorneys' fees in this action. In opposition to plaintiffs' request for attorneys' fees,

defendants contend that retroactive application of Public Law 99-372 is unconstitutional, and that even if the Act were otherwise constitutional, its application in a case where a final order regarding attorneys' fees had been entered before the statute was enacted would be unconstitutional.

Procedural History

Plaintiff previously requested an award of attorneys' fees pursuant to 42 U.S.C. § 1988 and Section 505 of the Rehabilitation Act of 1973. Relying on the holding in Smith v. Robinson[1] that attorneys' fees were not available under the statutory authority urged by plaintiffs, , [sic] by order of August 19,

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1 Smith v. Robinson, 468 U.S. 992, 104 S.Ct. 3457 (1984).

1985 the court denied plaintiffs' request for fees.[2] In reaction to the Supreme Court's holding in Smith, Congress passed the Handicapped Children's Protection Act of 1986 ("the Act"),[3] which was enacted into law in August 1986. The Act amended the Education of the Handicapped Act[4] to provide that attorney's fees could be awarded to the prevailing party in an action brought under that statute. Section 5 of the Act specifically provides that the provision permitting the award of attorney's fees "shall apply with respect

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2 By order of November 29, 1985, the court denied plaintiffs' motion to reconsider the August 19, 1985 order as to attorneys' fees.

3 Handicapped Children's Protection Act of 1986, P.L. 99-372, 100 Stat. 796, 20 U.S.C. §§ 14____.

4 Education for All Handicapped Children Act, 20 U.S.C. § 1401.

to actions or proceedings brought under section 615(e) of the Education of the Handicapped Act after July 3, 1984, and actions or proceedings brought prior to July 4, 1984, under such section which were pending on July 4, 1986."

Constitutionality Absent Prior Final Order

Defendants contend that Congress' attempt to make the availability of attorney's fees in an action under the Education of the Handicapped Act retroactive is unconstitutional. Principally, defendants argue that Congress passed the Education of the Handicapped Act pursuant to the Spending Clause, and that, since legislation enacted pursuant to the spending power is much in the nature of a contract, Congress cannot constitutionally impose retroactive conditions on the states in regard to such legislation. In support

of this proposition, defendants cite Pennhurst State School and Hospital v. Haldeman, 451 U.S. 1, 101 S.Ct. 153 (1981). Pennhurst does not deal with Congress' power to impose retroactive conditions on the states in regard to legislation enacted pursuant to the Spending Clause, but rather addresses the manner in which Congress must express conditions it imposes in legislation enacted pursuant to its spending power. See Rollston v. Biggs, C.A. 80-165 (D.Del. April 12, 1987). In fact, the Court in Pennhurst noted that the issue of "constitutional difficulties" arising from Congress' imposition of affirmative obligations on the states pursuant to the spending power was not before it in that case. 415 U.S. at 17 n.13, 101 S.Ct. at 1540 n. 13.

There are limits on the power of Congress to impose conditions on the states

pursuant to its spending power. Id. Congress has not, however, exceeded its constitutional authority in enacting the Handicapped Children's Protection Act. As originally enacted, the Education of the Handicapped Act did not explicitly address the question of whether attorney's fees were authorized for prevailing parties. Given the nature of the rights protected by the statute, several courts found that prevailing parties in action under the Education of the Handicapped Act were entitled to such fees. Following the Supreme Court's decision in Smith v. Robinson, Congress promptly enacted the Handicapped Children's Protective Act. The curative intent of this enactment is demonstrated in the House Committee Reports, which states that "[c]ongressional intent was ignored by U.S. Supreme Court

when, on July 5, 1984, it handed down its decision in Smith v. Robinson," and that one of the purposes of the new Act is to "reestablish statutory rights repealed by the U.S. Supreme Court in Smith v. Robinson." H.R. Rep. No. 296, 99th Cong., 1st Session 4 (1985). The power of Congress to legislate under the spending power is broad, and the curative legislation at issue in this case cannot be said to have so altered the expectations of the states or the condition imposed on the states by virtue of the Education of the Handicapped Act as to render Section 5 of the Handicapped Children's Protection Act unconstitutional.[5] Thus, the court finds that retroactive application of the Act is constitutional when applied to actions in which there have been no previous final order entered as to attorney's fees.

Constitutionality in Light of Previous Final Order

That a final, unappealed order regarding the availability of attorney's fees had been entered prior to enactment of the Act raises a serious constitutional barrier to the Act's application to this case.

> It is not within the power of a legislature to take away rights which have been vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the power of the rights created thereby ceases.

McCullough v. Virginia, 172 U.S. 102, 123-124, 19 S.Ct. 134, 142 (1898).

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5 Plaintiffs argue that th [sic] Education of the Handicapped Act was enacted at least in part pursuant to Section 5 of the Fourteenth Amendment to the United States Constitution. The court need not reach this issue.

In this case, the Supreme Court decided that attorney's fees were not recoverable under Section 504. Based on the law in effect at the time, this court therefore denied plaintiffs' request for attorneys' fees. Plaintiffs did not appeal that order, which became final. Congress subsequently enacted the Act, applying it retrospectively to actions pending on the date of the Supreme Court's decision in Smith.

> No congressional change in the law can retroactively effect a judicial determination brought to final judgment before that change. **Daylo v. Administration of Veterans' Affairs**, 501 F.2d 811, 816 (D.C. Cir. 1974). To permit otherwise would destroy the finality and independence of the judicial action. Even when a judgment is not final, "the separation of powers bar a federal court from giving operational weight to a pronouncement by Congress . . . that what had theretofore been judicially declared as law 'shall be deemed

> never to have had effect.'" **Cerro Metal Products v. Marshall**, 467 F. Supp. 869, 878 (E.D. Pa. 1978), aff'd, 620 F.2d 964 (3d Cir. 1980).

United States v. Board of Education of City of Chicago, 588 F. Supp. 132, 235 (N.D. Ill. 1984). "[A]s a general proposition, . . . especially as it respects adjudication upon the private rights of parties," legislation "cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby . . . ." State of Pennsylvania v. Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421, 31, 15 L.Ed. 435 (1855) (quoted in Daylo v. Administrator of Veterans' Affairs, supra, at 817).

The Handicapped Children's Protection Act of 1986 may not be constitutionally interpreted as voiding

judgments regarding the availability of attorney's fees under the Education of the Handicapped Act, which became final before the enactment of the Act. Therefore, the Act does not provide a basis for plaintiffs to recover attorneys' fees in this action.

CONCLUSION

Plaintiffs' request for attorneys' fees is hereby DENIED.

SO ORDERED, this 26th day of June, 1987.

/S/
HORACE T. WARD
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAY 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GEORGIA ASSOCIATION FOR RETARDED CITIZENS, et. al,
Petitioners,

vs.

CHARLES McDANIEL, et. al,
Respondents.

BRIEF OF THE LOCAL SCHOOL BOARD RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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School Board Respondents

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QUESTION PRESENTED

Whether, in view of constitutional obstacles including the separation of powers doctrine, the Handicapped Children's Protection Act of 1986 ("HCPA"), 20 U.S.C. §1415e, should be construed to apply retroactively to overturn a final, unappealed, district court order denying attorney's fees more than a year prior to the HCPA's enactment.

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JURISDICTION

Respondents do not contest that Petitioners have timely filed their petition for certiorari, however Respondents do not believe that any of the considerations under Rule 17 of the Supreme Court have been met.

STATEMENT OF THE CASE

The Local School Board Respondents ("Local Respondents") agree in substantial part with the Statement of the Case presented by Petitioners. However, the Local Respondents disagree with certain statements in Petitioners Statement of the Case which are also repeated in their brief and would add the following clarifications:

First, the Local Respondents would point out that the Petitioners achieved only a mixed success at best on the merits. Although the District Court issued an injunction in favor of Petitioners finding that Respondents should "consider" whether handicapped children in the plaintiff class might need extended school year services, the District Court refused to grant any relief to any individual plaintiffs

because the long processes of discovery and trial (during which a substantial portion of attorney's fees were incurred by both sides) showed that no one in the plaintiff class was in need of any relief. The Petitioners' cross appeal on these issues was denied. Georgia Association of Retarded Citizens v. McDaniel ("GARC"), 716 F.2d 1565, 1580-81 (11th Cir. 1983).

Confirming the limited nature of the Petitioners' success is the jurisdictional statement by these Petitioners in the response they filed earlier in this Court in Case No. 83-1431/1451 which argued that only "limited relief [was] afforded" the plaintiffs on the merits by the District Court. These facts are relevant to Petitioners' "fairness" argument in Part I(c) of the Petition.

Similarly, the Local Respondents wish to clarify that the Respondents were successful when the merits of the case were on appeal in that Petitioners' claim under Section 504 of the Rehabilitation Act was reversed. GARC v. McDaniel, 740 F.2d 904 (11th Cir. 1984).

The Local Respondents also disagree with Petitioners' proposition that the District Court's original Order of August 19, 1985 found that there was no right to attorneys' fees in this matter by considering only one statue, i.e., 42 U.S.C. §1988. In the District Court's 1985 Order denying attorney's fees, the Court wrote:

> Defendants object to the plaintiffs' request for attorneys' fees on the basis of the Supreme Court's decision in Smith v. Robinson, 468 U.S. _____, 104 S.Ct. 3457, 82 L.Ed. 2d 746 (1984). In Smith V. Robinson, the Supreme Court held that attorneys' fees are not awardable in an action arising under the Education For All Handicapped Children Act ("Handicapped Act"), 20 U.S.C. §1401, et seq., the

> only act under which plaintiffs ultimately prevailed in this case.

(Petition Appendix C) (emphasis added) (applying Smith v. Robinson, 468 U.S. 992 (1984).

Thus, the District Court's Order specifically denied that attorneys' fees were available under the Education For All Handicapped Children Act ("EHA"), the same act which has been amended by the Handicapped Children's Protection Act of 1986 ("HCPA") (20 U.S.C. §1415e) and under which Petitioners are presently seeking attorney's fees.

Finally, the Local Respondents would point out that footnote 2 of the Petition is both incorrect and irrelevant in arguing that Petitioners are entitled to attorney's fees for work on the appeals which arose prior to 1985. The disposition of the fee issue in 1985 would include disposition of fees for appellate

work connected with the original judgment on the merits.

REASONS FOR DENYING THE PETITION

A. Summary of Argument

The Petition should be denied because the Court of Appeals (and the District Court) properly held that the HCPA should not be construed to apply retroactively to overturn the final, unappealed District Court order of August 19, 1985 in view of the serious constitutional difficulties which would be encountered with such an application. There is absolutely no conflict among the circuits on this issue, and the Eleventh Circuit properly applied the principles enunciated by this Court including the principle against retroactive disruption of antecedent rights generally, the separation of powers principle which condemns legislative disturbance of final

judicial orders, and the principle that congressional enactments should not be construed in a manner creating serious constitutional difficulties unless absolutely necessary. Construing the Act as Petitioners have requested would unconstitutionally overturn the District Court's final, unappealed order entered more than a year prior to enactment of the HCPA. Such an intention is nowhere clearly expressed by the Act or its legislative history.

B. Argument

1. The Petitioners Incorrectly Assert a Conflict Among the Courts of Appeals.

There is absolutely no conflict among the Courts of Appeals on the issue of whether the HCPA can overturn final judgments as to attorney's fees. Nevertheless, Petitioners cite decisions in the Courts of Appeals for the Second,

Seventh, and Ninth Circuits and assert that the Court of Appeals' decision in the present case is inconsistent. (See Petition, pps. 49-51, citing Counsel v. Dow, 849 F.2d 731 (2d Cir. 1988), Tonya K. v. Board of Education of Chicago, 847 F.2d 1243 (7th Cir. 1988), and Abu-Sahyun v. Palo Alto Unified School District, 843 F.2d 1250 (9th Cir. 1988).)

Petitioners are clearly incorrect in asserting this inconsistency. First, the Petitioners must concede that the cases cited did not involve any prior judicial order on the attorney's fees issue. The Petitioners make this concession with the inexact statement that "in each case fees were not explicitly addressed" (Petition, p. 49). Moreover, there is striking language in the Seventh Circuit's Tonya K. decision which underscores the importance of this distinction and reaffirms the decision of

the Court of Appeals in the present case.

In Tonya K. the district court had entered a consent decree on the merits, and the issue of attorney's fees was reserved. The plaintiffs withdrew the claim for attorney's fees in July 1984 and subsequently reasserted it under the HCPA. Describing the doctrine that rights obtained by judicial judgment are constitutionally vested, the Court of Appeals in Tonya K. explained the significance of the absence of a judicial order on attorney's fees as follows:

> If the plaintiffs had pressed their claim in July 1984 and lost, we would have a harder problem. The plaintiffs argue that a reopening under Rule 60(b) does not interfere with vested rights because every judgment is subject to such reopening. On this view, however, there are no "rights" of any kind, and every decision fixing interests in property is forever malleable. We doubt that the Supreme Court would take that view, unless it is willing to overrule Hodges, O'Grady, and Wheeling & Belmont Bridge and jettison the doctrine. The plaintiffs did not press their

> claim, however; they withdrew it. There has never been a judicial disposition of the request for fees. The withdrawal in July 1984 is the equivalent of dismissing a suit without prejudice, then refiling it if the law takes a change in the plaintiff's favor.

Tonya K., 847 F.2d at 1248. Accord, Max M. v. New Trier High School District No. 203, 859 F.2d 1297, 1299 (7th Cir. 1988) (emphasizing that the lower court "wrapped up the litigation without addressing questions concerning fees").

It is clear that the Seventh Circuit's reasoning is completely consistent with the Eleventh Circuit's reasoning in the present case and that both courts see no reason for this Court to overrule the longstanding series of Supreme Court cases cited above by the Seventh Circuit. Interestingly, the Eleventh Circuit opinion in this case approvingly discusses the Seventh Circuit's Tonya K. decision which the

Petitioners claim is inconsistent. See, GARC v. McDaniel, 855 F.2d 805, 810, 812-13 (11th Cir. 1988).[1]

Thus, it is apparent that Petitioners' assertion of an inconsistency among the Circuits is merely an attempt to manufacture grounds for the granting of the writ of certiorari. In contrast, the decisions of the other Courts of Appeals are not only consistent with the decision herein but further confirm that the Eleventh Circuit's decision was correct.

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[1]It is also worth noting that petitioners could have equally well cited as "inconsistent" the Fifth Circuit's decision in Fontenot v. Louisiana, 805 F.2d 1222 (5th Cir. 1986) as they did in the Court of Appeals. However, the Court of Appeals herein carefully and thoroughly distinguished Fontenot as another case where there was no unappealed judicial order finalizing the attorney's fees issue.

2. The Petitioners Incorrectly Assert That Congress' Intent as to Unappealable Cases is Unambiguous.

The Petitioners contend that the Court of Appeals "ignored unambiguous Congressional intent" with respect to whether the HCPA would apply to overturn unappealable judicial orders regarding attorney's fees. (Petition, p. 14, 15-21). To the contrary, however, the statute itself is silent on this issue, and the legislative history cited by Petitioners is ambiguous at best.

Although Petitioners cite the comments of a few Congressmen to the effect that the HCPA would assist plaintiffs in preenactment proceedings which were "successfully resolved" after Smith v. Robinson or whose fee petitions were "rejected," these comments do not discuss plaintiffs with unappealable fee claims (a group which included the

plaintiffs in Smith v. Robinson itself). Instead, these comments would of course comprehend those plaintiffs whose cases were "successfully resolved" on the merits and whose fee claims were rejected because of Smith and were then appealed, reserved, or otherwise withdrawn (a group which would include such plaintiffs as those in Fontenot, Tonya K., Counsel, and Abu-Sahyun).

It is certainly far from clear that Congress intended that plaintiffs in unappealable fee cases (which would include the plaintiffs in Smith v. Robinson under the Petitioners' reading) would be able to ignore the final, unappealed orders which they had obtained against them. If Congress had so intended, it could have and should have expressly stated that the plaintiffs in such cases were entitled to some form of relief. The rationale of the Court of

Appeals in Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811 (D.C. Cir. 1974) is applicable here:

> Certainly we cannot hold that 38 U.S.C. §3111 applies to final judgments merely because no express exemption for such judgments is carved into the provision. Such an exemption is rarely if ever contained in new legislation. The exemption is to be assumed unless the legislature speaks clearly to the contrary.

Id. at 822-23 (emphasis added).

In Daylo part of the law reviewed was expressly made retroactive to 1940 (a 30-year period of retroactivity), yet the Court of Appeals refused to consider the law to be applicable to unappealable, final judgments because of the "serious constitutional problems which such an intent would raise." Id. at 823. Even though Congress expressly made the HCPA retroactive to cases pending or brought on or after July 4, 1984, "Congress might well have thought that, absent such

language, the amendment would be judicially construed to apply only prospectively." Daylo, 501 F.2d at 819. See, Greene v. United States, 376 U.S. 149, 160 (1964) (federal legislation must be considered prospective unless contrary Congressional intent is manifest).

Congress made the HCPA retroactive to July 4, 1984 because of Congress' displeasure with the Supreme Court's decision on July 5, 1984 in Smith v. Robinson. Thus, Congress simply ensured that the law could apply to cases pending or brought from that date forward. However, nowhere does the Act state that it is applicable to unappealable, final judgments rendered between July 4, 1984 and the August 4, 1986 date of enactment. Indeed, to follow Petitioners' construction of the HCPA would mean that the Act had the effect of reversing by legislative fiat the outcome between the

parties in Smith v. Robinson itself, a result nowhere suggested by the Act and clearly impermissible as a blatant legislative attempt to reverse the outcome of specific cases.

Thus, because Congress nowhere clearly expressed an intent to reverse unappealable judgments, the Court of Appeals for the Eleventh Circuit properly held that the serious constitutional difficulties associated with such an interpretation require that the Act be construed otherwise. The Court of Appeals properly followed several principles enunciated by this Court including, first, the principle

> that a retrospective operation not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'

United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982) quoting Union

Pacific R. Company v. Laramie Stock Yards Company, 231 U.S. 190, 199 (1913).

In addition to this principle regarding antecedent rights in general, the present case also invokes the constitutional principle of the separation of powers because Petitioners sought on August 26, 1986 to use the HCPA to overturn a final, unappealable court judgment on attorney's fees entered more than a year earlier on August 19, 1985. This Court has clearly stated:

> It is not within the power of the legislature to take away rights which have been once vested by judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

McCullough v. Virginia, 172 U.S. 102, 123-24 (1898).

The third principle enunciated by this Court, and properly recognized by the

Court of Appeals, is the rule that the Court of Appeals is obliged, whenever it is "fairly possible," to construe a statute in a manner that does not call that statute into constitutional doubt. See, GARC, 855 F.2d at 808 citing Crowell v. Benson, 285 U.S. 22, 62 (1932); Califano v. Yamasaki, 442 U.S. 682, 693 (1979).

Recognizing that Congress intended that the HCPA be retroactive, the Court of Appeals in this case properly applied the above principles to conclude that Congress nowhere expressed the clear intention that the scope of the retroactivity would include the overturning of unappealable court judgments. The Petitioners present no good reason for disturbing the Court of Appeals' application of the above principles to this case.

3. The Petitioners Incorrectly Assert that the Eleventh Circuit Articulated a Rule with No Exceptions.

The Petitioners repeatedly accuse the Eleventh Circuit of articulating a per se rule against retroactive legislation which has an impact on prior judicial judgments. (Petition, p. 13, 31, 40-41). To the contrary, however, the Court of Appeals carefully discussed the recognized exceptions to the general rule. See, GARC, 855 F.2d at 811-812. The Court of Appeals explained that such exceptional cases include those where the United States was a party to the prior judgment and Congress has chosen to waive the res judicata effect of the prior judgment which it had previously enjoyed. The exceptional cases also include those concerning "public rights" and equitable decrees.

The present case clearly does not fall within the first of these groups of

exceptional cases, and Petitioners do not suggest otherwise. (Utter v. Franklin, 172 U.S. 416 (1899), cited by Petitioners, appears to fall into this category in that the U.S. Territory of Arizona volunteered to take on the obligation of bonds previously declared void.)

The Petitioners do fleetingly suggest that this case "should fall within the class of 'public rights' cases which justify retroactive application." (Petition, p. 34 citing Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974) and Frankel v. Commissioner of Education, 480 F.Supp. 1156 (S.D.N.Y. 1979)). However, the district court decision in Frankel, decided in 1979, has nothing to do with attorney's fees under the HCPA, and this Court's decision in Bradley is not at all on point because that case involved attorney's fees legislation which was enacted during the

pendency of the litigation as conceded by the Petitioners. (Petition, p. 34).

Just as in Bradley, the legislation considered in Carpenter v. Wabash Ry. Co., 309 U.S. 23 (1940), also cited by Petitioners, was enacted while the case was still on appeal, so there was no separation of powers issue there either. The Court in Carpenter described the case as an ongoing set of bankruptcy proceedings where "[t]here is no suggestion that the present proceeding had been terminated prior to the enactment of the amendment or that it is not now pending." Id. at 29. Similarly distinguishable cases are Shung v. Brownell, 227 F.2d 40 (D.C. Cir. 1955)(previous "judgment settled nothing, since it was vacated"); Gaines v. Dougherty County Bd. of Educ., 775 F.2d 1565, 1569 (11th Cir. 1985) (previous orders on attorney's fees were deemed vacated and attorney's fees

issue postponed); and Shannon v. United States Dept. of H.U.D., 433 F.Supp. 249, 251 (E.D. Pa. 1977) (attorney's fees considered under pending cost petition and allowed on separate, substantive (Title VI) claim).

Describing the exceptional cases where subsequent legislation has been permitted to impact upon judgments involving public rights, the Court of Appeals in Daylo explained:

> What appears to unite these cases is that the injunctive decrees at issue were 'legislative' in function, attempting to control the legal status of a variety of future actions which the parties, or others, might or might not wish to take.
>
> 'The distinction is between restraints that give protections to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.'

Daylo, 501 F.2d at 818 (citations omitted).

This explanation is likewise found in cases cited by Petitioners and shows that those cases do not support the Petitioners. Thus, in Fleming v. Rhodes, 331 U.S. 100 (1940) this Court found that legislation could permit an injunction against future proceedings for evictions after the landlord appellees had acquired eviction judgments and the legislation subsequently made such evictions unlawful. The Court in Fleming explained: "Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution." Id. at 107. To similar effect is the decision in West Coast Life Insurance Co. v. Merced Irr. Dist., 114 F.2d 654, 661 (9th Cir. 1940).

Equally inapplicable to the present case are the cases cited by

Petitioners involving due process challenges to retroactive legislation. The Court of Appeals in the present case recognized that the constitutional dimension of the rights vested by a court judgment is two-fold: first, that rights fixed by a court judgment are a form of property entitled to constitutional protection; and second, that the constitutional doctrine of the separation of powers protects the judicial action from superior legislative review. See, GARC, 855 F.2d at 810.

The cases cited by Petitioners for the proposition that "due process is satisfied" did not involve this second constitutional dimension of the separation of powers doctrine. (See Petition, p. 44, citing Pension Benefit Guarantee Board v. R.A. Gray & Co., 467 U.S. 17 (1984); Counsel v. Dow, 849 F.2d 731 (2nd Cir. 1988); and School Board of Prince William

County v. Malone, 662 F.Supp. 999 (E.D.Va. 1987)). Likewise, this Court's decision in Paramino Lumber Co. v. Marshall, 309 U.S. 370 (1940), also cited by Petitioners, was a due process challenge to legislation impacting an administrative agency decision rather than a court judgment. Thus, the Court stated:

> Nor can we say that this legislation is an excursion of the Congress into the judicial function. 25/
>
> 25/ . . . the state cases cited by appellants upon the question of the invasion of judicial authority involved statutes affecting judicial judgments rather than administrative orders and are therefore inapplicable . . .

Id. at 381.

The Petitioners' misunderstanding of the separation of powers problem presented in this case is evident in their argument that "a statute does not present a separation of powers issue so long as the statute does not dictate a rule of decision in a specific case or mandate a

judicial resolution of specific facts." (Petition, p. 46 citing, but not quoting, United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); Moore v. D.C., 666 F.Supp. 263 (D.D.C. 1987), appeal filed, No. 88-7003 (D.C.Cir.); and School Board of Prince William County v. Malone, 662 F.Supp. 999 (E.D.Va. 1987)).

More precisely, this Court has explained that the separation of powers doctrine is violated if Congress either "disturbed the finality of a judicial decree" or prescribed "a rule for decision that left the court with no adjudicatory function to perform." Sioux Nation of Indians, 448 U.S. at 391 (emphasis added). As described above, the HCPA construction for which the Petitioners contend would, at a minimum, disturb the finality of the judicial decree involved in the present case.

The district court in School Board of Prince William County v. Malone, 662 F.Supp 999 (E.D.Va. 1987), cited by Petitioners, used a similar, erroneous analysis of the separation of powers doctrine. That court believed that the separation of powers doctrine could be violated only if the statute "prescribed a rule of decision in a pending case." Id. at 1000.

Likewise, the district court's decision in Capello v. District of Columbia, 669 F.Supp. 14 (D.D.C. 1987), also cited by Petitioners, is somewhat ambiguous, but it appears to take the view that the separation of powers principle applies only where legislation would in effect reverse a particular court's decision in a particular case. In the words of the district court:

> For legislation to be struck down because it encroaches on the power of the judiciary, it must dictate an

> outcome which reverses the Court's decision in the particular case.

Id. at 18 (emphasis added). In the present case the statutory construction urged by Petitioners would reverse the unappealed, final decision on attorney's fees in this particular case as well as reverse the outcome for the particular parties in the Supreme Court's Smith v. Robinson decision. Thus, Capello arguably repudiates rather than supports Petitioners' position.

A similarly erroneous, result-oriented decision appears in the district court decision in Yaris v. Special School District of St. Louis County, 661 F.Supp. 996 (E.D.Mo. 1987) also cited by Petitioners. The district court in Yaris never discussed the separation of powers doctrine and, instead, simply dismissed the defendants' concern about finality as "merely a corollary of the doctrine of

claim preclusion." Id. at 1000. Thus, the Yaris court completely omitted any discussion or recognition of the constitutional separation of powers issue.

In summary, it is clear that the Court of Appeals in the present case correctly articulated the general rule, and the exceptions, concerning the separation of powers problem invoked by legislation impacting judicial judgments.

4. The Petitioners Propose a Novel Balancing Test which is not Supported by the Case Law and Would not in any Event be Met by the Petitioners in this Case.

Petitioners repeatedly assert that "[a]nalysis of the permissible scope of a retroactive law requires a balancing test. . ." citing commentators, not cases, for authority. (Petition, p. 30-31). The Petitioners assert that such a balancing test must take into account several factors including the public interest

served by the statute, the extent to which the statute affects a preenactment right, and the nature of the preenactment right affected. (Petition, p. 30).

The Local Respondents submit that the Supreme Court cases discussed above do not call for any such balancing test in the present case and, furthermore, that Petitioners would in any event fail such a test. (Respondents submit that Petitioners have confused the balancing test for applying retroactive legislation to pending cases which do not present the separation of powers problem presented here. See, Bradley, 416 U.S. at 717).

The Petitioners describe the preenactment right affected by the HCPA as only "the right of the Defendants not to pay attorney's fees." (Petition, p. 35). The Local Respondents would submit that the preenactment right is much broader and includes the Respondents' right to rely on

a court judgment and the finality which it is constitutionally accorded.

The Petitioners also mischaracterize the Respondents' expectations by stating that "all the parties in the instant case expected that the Defendants would be liable for attorneys' fees if the Plaintiffs were successful." Id. To the contrary, from very early on in this litigation, the Respondents argued to the district court that all of the Petitioners' statutory claims were preempted by the exclusive remedies available under the EHA, a statute which did not provide for attorneys' fees. (These arguments are contained in the district court record in the May 20, 1980 Motion for Partial Judgment on the Pleadings as well as the August 22, 1980 Proposed Findings of Fact and Conclusions of Law, each submitted by the Local School Board Defendants). Thus,

to the Respondents, the decision in Smith v. Robinson was expected, not unexpected as argued by Petitioners.

Of course, the Respondents' expectations as to attorney's fees after the unappealed district court Order of August 19, 1985 (and even earlier after the July 5, 1984 Smith v. Robinson decision) quite justifiably included an expectation that the Respondents could not be liable for attorneys' fees in this case. The Petitioners' suggestion to the contrary, even as to the period after Smith v. Robinson, is clearly unfounded. (Petition, p. 39).

In making their "fairness" argument, Petitioners suggest that Petitioner families have incurred and paid attorney's fees in this litigation. (Petition, p. 33). However, Petitioners do not cite any record evidence of this assertion, and Respondents would point out

that Petitioners' suit was handled by government-funded legal services attorneys.

For the reasons discussed above, the Petitioners are clearly incorrect in asserting that the district court's decision denying attorneys' fees was nothing more than an unexpected windfall to the Respondents. In summary, because the Petitioners' balancing test argument relies so heavily upon their mischaracterization of the Respondents' preenactment right and the Respondents' expectations, the Petitioners' balancing test argument is unpersuasive as well as unsupported by the case law.

5. The Petitioners Incorrectly Assert that the HCPA Created a New, Independent Cause of Action for Attorneys' Fees.

The Petitioners argue again, as they did in the Court of Appeals, that the HCPA "created a new claim for attorneys'

fees" in the sense that it created a new cause of action. (Petition, p. 54-60). However, as the Court of Appeals in this case succinctly explained:

> Strictly speaking, the HCPA does not create a 'cause of action' or a substantively independent 'claim' for attorneys' fees.

GARC, 855 F.2d at 811.

Furthermore, the Petitioners repeatedly mischaracterize the district court's August 19, 1985 Order denying attorneys' fees as an Order "under a different statute," specifically 42 U.S.C. §1988. (Petition, p. 12, 59). To the extent that Petitioners are suggesting that the district court did not consider the availability of fees under the EHA (which was later amended by the HCPA), this is incorrect. Thus the district court's August 19, 1985 Order stated:

> . . . attorneys' fees are not awardable in an action arising under the Education for all Handicapped Children Act ('Handicapped Act'), 20

> U.S.C. §1401, et seq., the only act under which plaintiffs ultimately prevailed in this case.

Order of August 19, 1985. (Petition Appendix c).

For all these reasons, the Petitioners' argument that the HCPA created a new, independent claim for attorneys' fees is insupportable.

CONCLUSION

For all the reasons stated herein, Petitioners have not demonstrated any error below or conflict among the Circuits which would warrant a writ of certiorari. Accordingly, the Petition should be dismissed.

Respectfully submitted,

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